S. Hrg. 100-528

PERFORMING ARTS LABOR RELATIONS AMENDMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 1346

TO AMEND THE NATIONAL LABOR RELATIONS ACT TO GIVE EMPLOYERS AND PERFORMERS IN THE PERFORMING ARTS RIGHTS GIVEN BY SECTION 8(e) OF SUCH ACT TO EMPLOYERS AND EMPLOYEES IN SIMILARLY SITUATED INDUSTRIES, TO GIVE TO EMPLOYERS AND PERFORMERS IN THE PERFORMING ARTS THE SAME RIGHTS GIVEN BY SECTION 8(f) OF SUCH ACT TO EMPLOYERS AND EMPLOYEES IN THE CONSTRUCTION INDUSTRY, AND FOR OTHER PURPOSES

DECEMBER 10, 1987

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CONTENTS

STATEMENTS

Thursday, December 10, 1987

Page

Allen, R.A., president, the Ritz, Charleston, WV, prepared statement 5

Berglund, John F., executive director, Minnesota Licensed Beverage Association, Inc., prepared statement (with an attachment) 106

Carleton, John Wm., prepared statement 112

Dyke, Leroy Van, musician/entertainer/AF of M, member, prepared statement 143

Emerson, J. Martin, international president, American Federation of Musicians, New York, NY, accompanied by Mr. Kaiser, legal counsel; and Jay Collins, president, Local 257, American Federation of Musicians, on behalf of Nashville Musicians Association, Nashville, TN, accompanied by Ned Guthrie, legislative liaison 11

  Prepared statements of:

    Mr. Emerson (with an attachment) 14

    Mr. Collins 37

Golodner, Jack, director, Department for Professional Employees, AFL-CIO, Washington, DC, and Alan Eisenberg, executive secretary, Actors Equity Association, New York, NY 41

  Prepared statements of:

    Mr. Golodner 44

    Mr. Eisenberg 52

Hein, Darrel, president, National Ballroom and Entertainment Association, prepared statement 108

Hideg, Steve, member, union local 47, AF of M, prepared statement 141

Intorre, Ben, president and treasurer, American Musicians Union, Inc., prepared statement 137

Lunn, Chris, volunteer director of Victory Music, prepared statement 114

McCann, Edward G., Jr., executive vice president, Greater Boston Hotel Association, prepared statement 110

National Ballroom and Entertainment Association, prepared statement 163

National Hotel and Motel Association, prepared statement 125

Parker, Rex A., C.H.A., vice president and general manager, Best Western Clock Tower Resort, prepared statement 111

Peterson, Charles, orchestra leader and treasurer, National Association of Orchestra Leaders, prepared statement 131

Robertson, John D., general manager, Charleston Civil Center, prepared statement 6

Slagle, Stephen, executive director, National Association for Campus Activities, prepared statement 120

Smith, Billy, One Niters, Inc., prepared statement 8

Sweet, Thomas E., National Association of Orchestra Leaders, Minneapolis, MN, and William A. Heaberlin, chairman, Legislative Affairs Committee, International Theatrical Agencies Association, New York, NY, accompanied by John Tysse, ITAA Legislative Counsel 57

  Prepared statements of:

    Mr. Sweet (with attachments) 59

    Mr. Heaberlin 83

ADDITIONAL MATERIAL

Articles, publications, etc.:
- Facts vs. Fiction, 1987—Performing Arts Labor Relations Amendments, by Spark M. Matsunaga, U.S. Senator (Hawaii) and William L. Clay, U.S. Representative (Missouri) .... Page 9
- Analysis of the Performing Arts Labor Relations Amendments, S. 1346 95
- List of people opposed to the Performing Arts Bills, S. 1346 and H.R. 1638 116

Questions and answers:
- Responses of Mr. Heaberlin to questions submitted by Senator Matsunaga 103
- Responses of Mr. Sweet to questions submitted by Senator Matsunaga 80
- Responses of Mr. Emerson to questions submitted by Senators Humphrey, Metzenbaum, and Matsunaga 26

PERFORMING ARTS LABOR RELATIONS AMENDMENTS

THURSDAY, DECEMBER 10, 1987

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee convened, pursuant to notice, at 2:30 p.m., in room SD-430, Dirksen Senate Office Building, Senator Spark M. Matsunaga, presiding.

Present: Senator Matsunaga.

OPENING STATEMENT OF SENATOR MATSUNAGA

Senator MATSUNAGA. The Subcommittee on Labor will come to order. Good afternoon, ladies and gentlemen. Welcome to today's hearing on S. 1346, the Performing Arts Labor Relations Amendments of 1987.

As the principal sponsor of S. 1346, along with 26 cosponsors, I am pleased to have the opportunity today to hear from both proponents and opponents of this legislation.

It is my firm belief that because of the nature of the industry and past interpretations of labor law, performing artists, particularly musicians, do not currently enjoy the right to be collectively represented to the same extent as other workers.

I am committed to the fundamental premise of this bill, but it is my hope that any legitimate objections which are raised can be ameliorated through sincere bipartisan efforts to improve the legislation.

The Performing Arts Labor Relations Amendments will make three basic changes in the National Labor Relations Act. First, it will clearly define the employer and employee relationship between musicians and the purchasers of musical services.

This definitional clause is needed because only individuals who are defined as employees under the National Labor Relations Act are afforded a protected right to engage in collective bargaining. Under the current National Labor Relations Board interpretation, individuals who perform as independent contractors for tax purposes are not given the right to be represented by a collective bargaining agent. With this change, it will not matter whether an individual performs as an independent contractor, subcontractor, or permanent employee of the purchaser—he or she will still be guaranteed the option of being represented by a union.

Second, the bill will extend the current exemption for the construction industry under section 8(f) to permit employers and unions in the performing arts industry to enter into pre-hire agreements. These agreements are not required, and employers may choose not to enter such agreements. Like the construction industry, the performing arts industry is characterized by short-term employment. Under present law, these individuals cannot be represented by a union until they have been employed for thirty days and there is a majority vote in favor of union representation. Many performers do not work in one place long enough to meet these requirements, and therefore, are effectively denied representation by a union of their choice.

Finally, the bill will extend the exemption to section 8(e) to the performing arts industry. This exemption will allow employers and unions in the performing arts industry, like the construction industry and the garment industry, to enter into agreements under which employers would hire union subcontractors.

The bill also will allow a union in the performing arts industry to picket persons "in the relation of leader, contractor, recording artist, purchaser of entertainment or music, promoter, producer, or persons similarly engaged or involved in an integrated production of performance" in order to enforce agreed upon working conditions. This provision does not give a union the right to engage in representational picketing, but it does give a union the right to picket appropriate parties to a legitimate collective bargaining dispute.

[Opening statements of Senators Metzenbaum and Pell follows:]

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. Today's hearings of the Labor Subcommittee concerns S. 1346, the Performing Arts Labor Relations Amendments, which was introduced by my friend and colleague on the Labor Subcommittee, Senator Matsunaga.

Our labor laws have long provided millions of American workers the right to organize and engage in collective bargaining with their employers over the terms and conditions of their employment. But the professional musicians of this country have been left out of the picture.

I say that's not fair. Why should the musicians of this country be accorded second class status when it comes to bargaining rights? It doesn't take much to figure out that in most cases it is the hotel owner, or the airport lounge manager, or the bar owner who is ultimately in control of when the musicians will work, how many of them will work, how much they will be paid, and what kind of music they will play.

These talented Americans deserve better. We cannot justify denying performing artists access to the collective bargaining process that Congress established and made available to others more than 50 years ago. Senator Matsunaga's bill would provide performing artists the right to bargain with their true employers over their working conditions. It also would allow labor organizations representing performing artists to enter into prehire agreements, similar to labor organizations representing workers in the construction industry.

Allowing performing artists these simple rights is fair, it is much-needed, and it is long overdue. I commend my colleague, Senator Matsunaga, for his leadership on this legislation. The bill may not be perfect in its present form. If it needs modification, we should welcome constructive suggestions. I am pleased that we will hear today from organizations representing both sides of this issue, and I look forward to their testimony.

STATEMENT BY SENATOR CLAIBORNE PELL

Senator PELL. Let me first take a moment to thank you Mr. Chairman for taking time from your busy schedule to hold this hearing. In the last several years we have come very close to sending this bill to the Senate floor. Let us hope that with this hearing at the end of the first session of the 100th Congress, we will be able to devote our full effort to sending this bill to the floor for final passage at the earliest possible point in the second session. Each year when this bill is introduced, it gathers more and more support. In the last Congress, we obtained 38 cosponsors. It is my hope that this historic 100th Congress will be the Congress in which this bill is passed and signed into law.

I would also like to take time to recognize the continuing efforts of Mr. Ned H. Guthrie, the National Legislative Director of the American Federation of Musicians. Ned, who has become known to all of us here on Capitol Hill as a tireless worker on behalf of the musicians of this nation, is also known by his peers as a quite an accomplished musician. Ned is therefore able to speak to us about the importance of S. 1346 from a first hand point of view.

Mr. Chairman, in 1968, the United States Supreme Court recognized the unique characteristics of the entertainment industry—short term employment, little or no job security, and fierce competition. As a result, the Court developed a set of exemptions from the federal anti-trust laws for professional performing artists and their unions.

The action by the Court is meaningless however, because the National Labor Relations Act does not recognize the same uniqueness that the Supreme Court did. For that reason, in the 99th Congress, I introduced S.670, a bill to amend the National Labor Relations Act to provide basic employment protection to musicians, who, for so many years, have worked without the benefits of federal employment protection. That bill and the bill that Senator Matsunaga has introduced in the 100th Congress, S. 1346, permit these entertainers to bargain collectively for the conditions of their employment. I believe that it is unfair that performing artists, who work in one of the most competitive fields in the nation, are not protected by federal labor laws. It is my firm belief that we should extend the protective blanket of this nation's labor laws to those employees that need it the most.

Thank you again Mr. Chairman.

Senator MATSUNAGA. At this point, without objection, I would like to have several letters in support of the bill included in the record. These letters are from a nightclub owner in Charleston, West Virginia; the general manager of the Charleston Civic Center; and a theatrical booking agency in Nashville, Tennessee.

In addition, I would like to include in the record a copy of an article coauthored by me and Congressman Clay, who is the primary sponsor of this legislation in the House.

[The material referred to follows:]

The Ritz
1203 Virginia Street East
Charleston, WV 25301
(304) 343-1050

December 1, 1987

The Honorable Spark M. Matsunaga
United States Senate
Committee on Labor and Human Resources
Senate Hart-109
Washington, DC 20510

Dear Senator Matsunaga:

Regarding S. 1346, the Performing Arts Labor Relations Amendments of 1987, which you introduced in Congress and which directly relates to the operation of nightclubs, as an operator of one of the many supper clubs in this area, I have a close association with local musicians and I employ them on a regular basis and have done so for many years. Also, I use a blend of entertainment which is offered to my clientele. I feature many nationally known musical groups.

For convenience and reliability I have found that the musicians and performers who are members of the American Federation of Musicians provide me with quality and reliability. Their affiliation with unions of their own selection has been no obstacle in the successful conduct of my business. It has been productive and beneficial to be able to communicate in person with their union representatives when I have so desired and vice versa. I do not believe this legislation before your committee will hinder my operation, as it will not force me to hire only union musicians, nor will I be required to do withholding and run a payroll unless I so choose and musicians desire such an arrangement--the matter being optional for me as the employer and the musicians as the employees. This bill will merely provide both management and employees the reality of true employer and true employee. I will never have a nightclub where there is any doubt as to my being a boss in charge of those who perform on my premises. I have found Appalachian Regional Musicians Union, Local 136, that represents professional musicians in this district, to be fair and interested in representing good entertainment--not as sales agents but as representatives who wish to bargain for some determination of the working conditions of its members. I do believe the overall result of the passage of this bill would benefit the customers, employees, and entrepreneurs of entertainment in this area.

May I request that this statement be entered in the record at the hearing on S. 1346 scheduled before the Labor Subcommittee on December 10, 1987.

Sincerely,

R. A. Allen
President

JCS706

CHARLESTON
CIVIC CENTER

200 Civic C[illegible]
Charleston, W.V. [illegible]
(304) 34[illegible]
[illegible] - 58

November 6, 1987

The Honorable Senator
John D. Rockefeller, IV
Hart Senate Office Building
Washington, DC 20510

Dear Senator Rockefeller:

I've recently had some lengthy discussions with Mr. Ned Guthrie regarding Senate Bill 1346 the "Performing Arts Labor Relations Amendments". He has explained the provisions of this bill to me in depth, and I believe from the information he has provided to me that this would not adversely affect clients using our public assembly facilities or the touring concert industry.

Please be advised that based on my interpretation of Senate Bill 1346 and my conversations with Mr. Guthrie regarding the problems he has experienced in the industry and his assurances that this bill will in no way require any reporting to the I.R.S. and other agencies, that we would like to withdraw our previous objection and concern regarding the "Performing Arts Labor Relations Amendments". I appreciate your attention and concern.

If you should have any questions or need any information, please don't hesitate to call.

Sincerely,

John D. Robertson
General Manager

John

JDR:kq

AGING SUBCOM
87 DEC -3 AM 11:29

one niters, inc.
BOX 40686, NASHVILLE, TENNESSEE 37204, PHONE 615/38[illegible]412

November 30, 1987

Honorable Senator Spark M. Matsunaga
Attn: Lois Fu Staff Director
SH-109 Senate Hart Office Bldg.
Washington, DC 20510

Re: S. 1346 & H.R. 1638, commonly referred to as THE PERFORMING ARTS LABOR RELATIONS AMENDMENTS OF 1987.

ONE NITERS, INC., a Theatrical Booking Agency located in Nashville, Tennessee, feels that musicians and performers must be protected, so we have been closely following THE PERFORMING ARTS LABOR RELATIONS AMENDMENTS LEGISLATION. We think musicians and performers need to be allowed to be represented by union representatives of their own choosing. In no way would passage of this legislation force us or any purchaser to become liable for taxes of any kind.

Prior to 1968 when the National Labor Relations Board began to assert jurisdiction over our industry and when matters arose in entertainment, we knew who the employer was. However since 1968 recent decisions of the National Labor Relations Board has turned our contractual situation into much uncertainty for musicians and performers, and it is unclear who the true employer is. For labor law purposes, each and every musician and performer who plays an engagement should not be forced to lose their employee status as decreed by the NLRB.

ONE NITERS, INC. deals in a broad spectrum of the music field. We book clubs, dinner theatres, showrooms, fairs, parks, festivals and produce many other special events ranging from local entertainers to Top Notch Name Entertainers throughout the United States. In addition to this we have recently developed a promotion wing to our company which allows us to promote our own shows across the country.

We favor passage of this legislation and in no way would passage of this bill alter our right to represent or book union or non-union musicians as a matter of our preference. Certain allegations have been made by other interests that all musicians must be union is untrue in the United States and can never be. In recent history, no A.F. of M. official has ever threatened me or told me I could only use union musicians.

I do not feel I will be restrained in any matter in booking whom I please, nor will it affect supply and demand negotiations. I feel there will be best results if the musicians or performers are allowed the choice of becoming the employee or individual contractor for labor law purposes and under this bill musicians can assert their option.

I compliment you Senator for your support of this legislation and ask that this letter be included in the documents submitted at the hearing on December 10, 1987. Also I would be glad to testify at this hearing if needed.

Respectfully yours,

ONE NITERS, INC.

Billy Smith

Billy Smith

BS/gs

From the Office of
SPARK MATSUNAGA

FACT VS. FICTION
1987

PERFORMING ARTS LABOR RELATIONS AMENDMENTS

By Spark M. Matsunaga, U.S. Senator (Hawaii) and William L. Clay, U.S. Representative (Missouri)

As the sponsors of the Performing Arts Labor Relations Amendments of 1987, we are pleased to report that the response to this proposed legislation has been excellent. In the Senate S. 1346 now has the support of twenty-two cosponsors; in the House, H.R. 1638 is currently cosponsored by forty-seven Representatives.

As the bills proceed through the legislative process, we feel a particular obligation to ensure that the purpose and implications of S. 1346 and H.R. 1638 are portrayed accurately and fairly. Labor law generally is very complicated and this proposed legislation is no exception. Overly simplified statements about the consequences of any change in labor law are almost always misleading, if not incorrect.

As legislators, we would like to offer some insights about what the bill does and does not do to the rights and obligations of musicians and purchasers of musical entertainment. In the text that follows we offer a summary of the legislation and then answer some specific questions about how it will affect both musicians and their employers.

SUMMARY OF S. 1346 AND H.R. 1638

The purpose of the Performing Arts Labor Relations Amendments of 1987 is to give musicians and other performers the right to bargain collectively with their true employers and to create a stable collective bargaining environment. The bill amends the National Labor Relations Act (NLRA) originally enacted in 1935, in order to extend two exemptions to the performing arts industry and to allow musicians and their true employers to meet at the collective bargaining table.

Defining Employers and Employees in the Performing Arts Industry for the Purposes of Labor Law. **The last provision in the proposed legislation clearly defines the employer and employer relationship between musicians and the purchasers of musical services for the purposes of labor law. This section would, for the purposes of NLRA, define "employer" to include any person who is the purchaser of musical performance services, regardless of whether the performer of such services is an independent contractor, employer or employee of another employer."** The bill also explicitly states that independent contractors who are engaged to perform musical services (other than an employer of persons performing musical services) shall be included in the term "employee" for the purposes of labor law.

This definitional clause is necessary because only those defined as employees under the National Labor Relations Act are afforded a protected right to engage in collective bargaining. It is important to note that this designation does not apply for any other purpose, such as tax law. It merely gives performing artists the option of union representation under labor law — an option not currently enjoyed.

Senator Spark M. Matsunaga

Extending Section 8(f) to the Performing Arts Industry. Section 8(f) of the NLRA currently allows an employer in the construction industry to negotiate a pre-hire agreement with a construction union before the union's majority status has been established through an election. In addition, it allows a minority union in the construction trades to bargain for a seven-day "union shop agreement," which, if agreed to by the employer, can require newly hired workers to join the union or **pay the equivalent of union dues within eight days of employment.**

Due to the short-term nature of employment which is common in the performing arts industry, musicians are often effectively denied representation by a union of their choice. Under present law, these individuals cannot be represented by a union until they have been employed for thirty days and there is a majority vote in favor of union representation. Many performers, who are often hired for a short engagement of perhaps one day or two weeks, cannot technically meet these requirements.

Our legislation would extend the pre-hire provisions of Section 8(f) to the performing arts industry, allowing — but not requiring — an employer to enter into an agreement which recognizes the union as the collective bargaining agent for the performers it hires. Even if the employer and the union enter into such an agreement, however, the performers do not lose their right to petition the National Labor Relations Board to decertify the union. It should also be noted that, notwithstanding other provisions of the labor law, in the twenty-one states which have right-to-work laws, no employee may be required as a condition of employment to join a union or pay union dues.

Extending the Exemption to Section 8(e) to the Performing Arts Industry. Section 8(e) of the NLRA prohibits employers and unions from entering into agreements in which the employer agrees to refrain from doing business with another employer. Currently, the only exceptions to the proscription against such agreements are in the garment and construction industries. These exceptions were granted by Congress due to the fragmented nature of the production process in these industries. Our legislation adds the performing arts industry to the list of exempted industries. Essentially, the exceptions allow — but do not require — employers and unions to enter into agreements under which employers would hire union subcontractors.

There is also a provision which creates an exception to Section 8(b)4(B) of the NLRA (known sometimes as the "secondary boycott" provision), **that will allow a union in the performing arts industry to picket "persons in the relation of a leader, contractor, recording artist, purchaser of entertainment or music, promoter, producer, or persons similarly engaged or involved in an integrated production or performance" to enforce agreed upon working conditions. This exemption is similar to the exemption granted to the garment industry, and is necessary due to the similarly fragmented nature of production in the performing arts** industry.

Will all musicians be subject to the provisions of this bill?

The only effect that this bill will have on "all musicians" is to give each the right to form, join or assist a union to act as a collective bargaining agent and to negotiate the terms and conditions of employment on his or her behalf. It is important to remember that this is a right, not a mandate; all musicians also have the right to refrain from such activities.

Representative William L. Clay

Is everyone who purchases musical services covered by this law?

No. The National Labor Relations Act applies only to employers whose activities affect interstate commerce. Small employers or purchasers of musical services, such as the family of a bride, the chair of a firefighters ball, or a local club, would not have enough effect on interstate commerce to come under the coverage of the NLRA, and thus would not be affected by the proposed bill.

Even if an employer's business does "affect commerce" between states, it would not be subject to the terms of the NLRA unless it meets minimum monetary standards established by the National Labor Relations Board for asserting jurisdiction. The current standard for non-retail businesses is that they must either make $50,000 in purchases of supplies or sales from out-of-state in order to come under the Board's jurisdiction. General retail establishments, restaurants, country clubs, hotels and casinos must have at least $500,000 in annual business to fall under the Board's jurisdiction. The volume of business required for private colleges, symphony orchestras and art museums is $1 million. Public colleges, orchestras and museums are exempt from coverage under the NLRA, since it expressly defines the term "employer" to exclude "any state or political subdivision thereof."

Will a union be able to keep individual musicians from working, force them to join the union, or force them to pay union dues?

Some opponents of this legislation would have you believe that unions will be able to dictate who works and who does not work in the industry or force individuals to join a union because of certain provisions in this bill. While the reasoning is not always clear, this perception seems to be based on a misinterpretation of the pre-hire clause of the legislation.

There are several important things to know about pre-hire agreements.

1. In the twenty-one right-to-work states, no employee may be required to pay union dues as a condition of employment, regardless of the existence of a pre-hire agreement.

2. An employer does not have to enter into a pre-hire agreement; pre-hire agreements must be agreed to by both the employer and the union.

3. A union cannot picket or use other economic coercion to force an employer to either negotiate or sign a pre-hire agreement.

4. Even if a pre-hire agreement is in existence, workers cannot be compelled to join the union or barred from employment because they do not join the union; unions are precluded from discriminating against employees on the basis of union membership.

5. Workers who are employed more than seven days may be required by the terms of a pre-hire agreement to pay the equivalent of union dues. "Conscientious objectors" may pay this amount to a charity instead of the union.

6. **Workers would retain an unrestricted right to decertify or "vote out" a union even though the union has entered into a pre-hire agreement with a particular** employer.

With all of these conditions applicable to pre-hire agreements, it is safe to say that a union would not be empowered by this legislation to keep an individual from working, to force anyone to join the union, or to discriminate against any qualified worker on the basis of union membership in referring that individual for a job.

Will musicians have to pay more taxes? Will purchasers of musical entertainment be required to keep more detailed records for musicians, as they do now for their other employees?

There has been concern expressed about whether defining independent contractors as employees for the purposes of labor law will, in effect, change their status with respect to tax law. It is important to understand that there is no language in this bill which affects the tax code and, as principal sponsors of this legislation, we can unequivocally state that there is no legislative intent to do so. In fact, under the rules of the Senate and the House, neither the Senate Committee on Labor and Human Resources nor the House Committee on Education and Labor may report legislation which affects the tax code without referring the legislation to the appropriate Senate or House Committee. No such referral has been made or requested.

Similarly, this bill will not have any direct effect on the record-keeping requirements of employers. Record-keeping would only change to the extent that employers choose to hire more or fewer independent contractors, as defined by the current tax law, or to provide additional benefits to workers under the terms of collective bargaining agreements and, thus, modify their tax status. To the extent that under these agreements employers exercise greater control over the musicians or confer greater benefits to these workers, their status could change under the tax law. If the collective bargaining agreement stipulates that the purchasers exert little control over the musical performance services, then there would be no reason to expect their status as non-employees under the tax code to be changed.

Will musicians still be able to perform as independent contractors?

Of course. The decision to perform as an independent contractor is entirely up to the individual.

Will musicians be required to use only union-approved booking agents, appear on only union-approved television shows, or record for only union-approved recording labels?

Nothing in the bill would impose such requirements. Further, the bill clearly does not permit agreements under which purchasers refuse to deal with particular booking agents or talent agencies. A union, therefore, may not restrict the ability of its members to utilize the services of any booking agent or talent agency which is acting in the capacity of an agent.

If an individual musician chooses to join a union — a choice which is facilitated by this legislation — the union may require that its members only work for those employers honoring its collective bargaining agreements. However, nothing under the labor law requires full union membership; the most that can be required under the terms of any collective bargaining agreement is that an employee tender the uniform dues and initiation fees required as a condition of membership. Required union participation, even under a collective bargaining agreement, is thus reduced to a financial core, and an employee cannot be subjected to internal union discipline unless he or she has voluntarily joined the union. Furthermore, the union may not restrict an individual from resigning membership at any time.

Would musicians be unable to negotiate lump sum payments for their work, be required to work for rates dictated by union officials, or be required to use a union-approved form contract for all their engagements?

As independent contractors, many musicians receive lump sum payments for their work, bear their own expenses for self-employment taxes and health insurance, and take on the risk of periods of unemployment and illness without the security of either unemployment compensation or group health insurance.

Current labor law, which excludes independent contractors from the status of employee, stands as an effective barrier to collective representation. By allowing musicians to choose to be represented by a union, the bill does not dictate the terms of any collective bargaining agreement which might subsequently be negotiated. Rather, it gives musicians the opportunity to collectively bargain for benefits and working conditions. Any particular contractual provision, such as a lump sum payment for services or even the specific amount of compensation to be earned, depends upon the terms which are negotiated and would be unaffected by any provision of this legislation.

Could purchasers of musical entertainment be legally picketed and people urged to boycott an establishment if purchasers refuse to deal directly with the union or refuse to hire only union musicians?

Under current labor law, any union may picket an establishment for informational purposes. Furthermore, under current law, a musicians' union may also picket an employer for up to thirty days for representational purposes. Unions are expressly forbidden, however, to picket an employer in order to obtain a pre-hire agreement. Under this bill, the restriction on picketing to obtain a pre-hire agreement is extended to musicians' unions. Musicians' unions would also lose their right to engage in thirty-day representational picketing if this bill is enacted into law.

Would purchasers of musical entertainment be required to sign an agreement with a union requiring all musicians they engage to be union musicians?

As indicated earlier, pre-hire agreements, as they are commonly called, are agreements which may be voluntarily entered into by an employer and a union. Employers are in no way forced by this legislation to do so; this bill would simply permit such agreements, which are currently allowed only in the construction industry, to be utilized in the performing arts industry. Furthermore, as noted above, a union is not permitted to use economic coercion, such as picketing, to obtain such an agreement.

Would purchasers of musical entertainment be compelled to allow musicians' union representatives to operate freely on their premises in order to recruit union members?

This legislation would have no effect on the right of union representatives to recruit members. Presently, however, the National Labor Relations Act carefully balances the property rights of employers against the rights of employees to organize for collective bargaining purposes. Non-employee access to a business establishment is permitted only when other means of contacting employees is not possible.

A RECENT VISIT WITH SENATOR SPARK MATSUNAGA CONCERNING OUR MUSICIANS' BILL

By Ned H. Guthrie, National Legislative Director

There has been an increasing amount of disinformation circulated about the Performing Arts Labor Relations Amendments (PALRA) of 1987. With this situation now turning up as the mode of operation of vociferous opponents to the musicians' right-to-talk bills, S. 1346 and H.R. 1638, and also in response to requests for printed answers to this disinformation, I took a news item from the March 11, 1987, issue of *Variety* and other comments as distributed through the U.S. mail by Charles Peterson, Treasurer of the National Association of Orchestra Leaders (NAOL), with me to an appointment with Senator Spark Matsunaga (D.-Hawaii), the primary sponsor of PALRA. I asked the Senator if this did not appear to be, in reality, an attack on the integrity and personal judgement of the chief sponsors of S. 1346 and H.R. 1638. I asked for a rebuttal by the Senator and Representative William L. Clay (D.-Missouri), as it was my belief that if the public could see and read the truth in print, with their signatures, the false statements being given out by the International Theatrical Agency Association (ITAA) and NAOL would be recognized and proved to be fabrications designed to prevent entertainers and musicians working in clubs from having a voice in determining their working conditions under law and equality.

Senator Matsunaga himself remarked that the article in *Variety* was full of misinformation, and that he would write a letter to the music editor of *Variety* and ask that it be published. Appearing next in this report is the *Variety* news item (reprinted with permission):

ITAA, NAOL GEAR TO FIGHT UNION ON EMPLOYMENT BILL

The Intl. Theatrical Agencies Assn. and the Natl. Assn. of Orchestra Leaders met in Washington's Capitol Holiday Inn March 8-10 to plot their strategy for defeating a new version of Senate bill 670. Bill, sponsored by the American Federation of Musicians, seeks to classify as employers those hiring the bandleader. Under terms of the bill, the employer would be responsible for withholding, social security, unemployment and Workmen's Compensation taxes.

Both ITAA and NAOL helped defeat a similar measure introduced in the Senate last year.

Batoners as Employers

AFM sought the bill following a ruling two years ago in a federal court covering Puerto Rico, which stated that orchestra leaders — and not the hotel where they are playing — were employers of sidemen. Union sought to negate that ruling by securing passage of a new law that would classify the hotel as employer.

The AFM believes the taxes are more certain of being paid by the ultimate user of the music, who also may control the repertoire, time and method of performance.

Also opposing the measure last year and expected to send in a protest to this session of Congress will be the Intl. Assn. of Auditorium Managers, who, in addition to the tax provisions, object to the added record-keeping necessitated by the measure.

Also printed below are more examples of the disinformation distributed by NAOL Treasurer Peterson, which are designed to frighten and mislead purchasers of entertainment and those who perform the entertainment throughout the United States.

Peterson states that, if passed, S. 1346 would affect orchestra leaders, groups that are equal partners-co-ops, singles, all musicians and booking agents in the following ways:

(1) **All musicians** who provide a musical service would be employees of whomever purchases their services.

(2) **All musicians** would lose their independent contractor status.

(3) **All musicians** would have all taxes withheld by whomever contracts for their services.

(4) **All musicians** would have to use a union form contract for all engagements.

(5) **All musicians** could not do business with non-union booking agents.

(6) **All musicians** could not record for recording labels that are not union approved.

(7) **All musicians** could not appear on television shows that are not approved by the union.

(8) **All musicians** would not be permitted to negotiate a lump sum for their services.

(9) **All musicians** would work for rates dictated by union officials.

(10) **All musicians** would each receive separate checks from the purchaser.

(11) **All musicians** must allow the purchasers to deduct work dues and union dues from their "salary."

(12) **All musicians** would be ordered off the bandstand if they are not union members.

(13) **All musicians** must show that they are union members wherever they work.

(14) **All musicians** engaged by purchasers who have not signed with the union could be picketed.

Peterson also "explains" how S. 1346, if passed, would affect purchasers of musical entertainment.

(1) **Purchasers of musical entertainment** would be employers of musicians, thus be required to withhold all taxes, make unemployment insurance, compensation payments, include musicians in their liability insurance coverage and contribute to union pension and welfare funds.

(2) **Purchasers of musical entertainment** would be compelled to keep detailed records as they now do for their other employees, such as waiters, waitresses, bartenders and kitchen help.

(3) **Purchasers of musical entertainment** could be legally picketed and people urged to boycott any establishment if purchasers refuse to deal directly with the union or refuse to hire only union musicians.

(4) **Purchasers of musical entertainment** could have their deliveries of food and supplies disrupted as a result of picketing by the Musicians' Union.

(5) **Purchasers of musical entertainment** would be required to sign an agreement with the union requiring all musicians they engage to be union musicians.

(6) **Purchasers of musical entertainment** will be forced to fire musicians who are not union members and who refuse to join the union.

(7) **Purchasers of musical entertainment** will be compelled to allow Musicians' Union business agents to operate freely on their premises in order to force union membership.

As you can see in the preceding article by Senator Matsunaga, ranking majority member of the Senate Labor Committee, and Representative Clay, Chairman of the House Labor-Management Subcommittee, these allegations are wholly misleading.

Senator **Matsunaga**. Mr. J. Martin Emerson, President of the American Federation of Musicians, and Mr. Jay Collins, President of the Nashville Local of the American Federation of Musicians. Accompanying them are Mr. Kaiser who is, as I understand, the legal counsel, and Mr. Ned Guthrie whom everybody here on the Hill knows. He is a fixture on the Hill and legislative liaison for the musicians.

Gentlemen, I am pleased to have you join us today. Your written statements will appear in the record as though presented in full, but because we have a meeting today with Secretary Shultz relative to the recent signing of the Treaty, we need to be as brief as possible. We are going to use this "traffic light" system. When the green light is on, you go; when the yellow light is on, you go like hell, because you've got only a minute left; and when the red light comes on, you conclude. We will allow you to finish your thought.

So with that, let me call upon you, Mr. Emerson, to testify first.

STATEMENTS OF J. MARTIN EMERSON, INTERNATIONAL PRESIDENT, AMERICAN FEDERATION OF MUSICIANS, NEW YORK, NY, ACCOMPANIED BY MR. KAISER, LEGAL COUNSEL; AND JAY COLLINS, PRESIDENT, LOCAL 257, AMERICAN FEDERATION OF MUSICIANS, ON BEHALF OF NASHVILLE MUSICIANS ASSOCIATION, NASHVILLE, TN, ACCOMPANIED BY NED GUTHRIE, LEGISLATIVE LIAISON

Mr. **Emerson**. Thank you, and good afternoon, Mr. Chairman.

Senator **Matsunaga**. Good afternoon.

Mr. **Emerson**. My name is J. Martin Emerson. I am the International President of the American Federation of Musicians, a labor organization which represents approximately 200,000 professional musicians.

First, I want to thank you for this opportunity to explain why the AFM supports Senate Bill 1346. On a personal note, this experience is noteworthy for me, since it is the first time I have appeared before the Senate or the House since taking office as President of the AFM in September, 1987.

My comments today are informed not only by my lifetime as a union official, but also by 40 years as a performing musician—a trombone player.

Mr. Chairman, since the 1970s, there has been a great deal of confusion about the application of our Federal labor laws to the performing musician. This confusion resulted from the unique character of the music industry. The consequence has been that musicians are left unable by concerted activity to improve their financial lot in life.

Of course, this is exactly the opposite of the purpose of the NLRA, which was enacted to give American workers the right to organize and bargain collectively. Senate Bill 1346 is designed to return to performing artists the rights of all other American workers.

Musicians provide their services in many diverse settings—from major symphony, opera and ballet orchestras, and motion picture and phonograph recording studios, to local hotels, theaters, clubs, lounges, and private social events.

A relatively small portion of our membership functions in a work pattern which is not so different from that of the mainstream American worker for whom the labor laws were designed.

For instance, there is no question but that there is a traditional employer-employee relationship between musicians and the symphony associations for whom they work. However, the overwhelming preponderance of musicians function under a completely different set of circumstances.

People want to hear live music in big and small hotels, clubs and lounges. People want music at their weddings, bar mitzvahs, company dinner dances, picnics and special celebrations of every size and variety. Thousands of musicians find their professional joy and their livelihood in filling this heartfelt need of people everywhere to dance, sing, listen and celebrate to live music.

These musicians enjoy the gratification of live performance. But the nature of such live engagements exacts a serious economic toll. Their employment is not steady; it is extremely casual and episodic. Instead of having an ongoing relationship with one employer, the musician will work for many successive purchasers of his services over the course of a month, a week, or even a single day. And, instead of a continuing relationship with the same co-employees, the musician will perform with many different musicians at different events.

The problems of the performing musician were compounded by the application of the National Labor Relations Act some year after the enactment of Taft-Hartley. Prior thereto, the universal understanding was that the purchasers of musicians' services were their employers. But in the 1970s, a series of ill-advised decisions destroyed that understanding. Since the labor laws apply only to employer-employee relationships, the result was that the purchasers could no longer be compelled to bargain with the musicians' chosen representatives. All over the country, hotels and lounges were free to refuse to bargain with the AFM or its affiliated locals.

It is hard to put into words just how much confusion resulted from those ill-advised decisions. To try to do so, I need first to explain one more unique aspect of the music industry.

Frequently, one musician assumes the role of "leader" of an orchestra. A purchaser of musical services contracts with the leader. The leader makes the necessary arrangements to obtain the services of other musicians, called sidemen, and together they perform the engagement. Often the roles of leader and sidemen are exchanged.

The question arose over and over again: Who was the musicians' primary employer for the purposes of the National Labor Relations Act? If the musicians had a dispute about wages or terms of employment, against whom could they engage in protected concerted activity under the labor laws?

Suppose the musicians' union has a labor dispute with a hotel lounge in a certain city. The hotel then contracts with an out-of-town union orchestra to perform services that would have been performed by striking musicians. Under well-settled labor law principles, the union should be able to urge its members to honor its strike. But under the board rulings, the musicians are without a primary employment relationship to the hotel, and any union effort to discipline strike-breaking members could be a secondary boycott.

Senator **Matsunaga**. Thank you very much, Mr. Emerson.

Mr. **Emerson**. I had not finished my statement, Mr. Chairman. How much time do I have left?

Senator **Matsunaga**. Well, you had five minutes. The red light has come on.

Mr. **Emerson**. All right, sir.

Senator **Matsunaga**. And you did get an extra minute.

Mr. **Emerson**. Thank you, sir.

Senator **Matsunaga**. But as I said, your written statement will appear as though presented in full; and what we would like to have you do is just summarize your statement within five or six minutes.

Mr. **Emerson**. Very good. May I ask that a letter that I received from an international organization in Geneva, Switzerland, which I visited two weeks ago and from which I received a letter that I asked them to write in support of this legislation—may I introduce it as part of the record?

Senator **Matsunaga**. Without objection, the letter will be included as part of the record.

Mr. **Emerson**. The organization is the International Secretariat for Arts, Mass Media and Entertainment Trade Unions.

Senator **Matsunaga**. Thank you.

Mr. **Emerson**. Thank you, Mr. Chairman.

[The prepared statement of Mr. Emerson, the letter referred to, and responses to questions subsequently submitted by members of the committee follow:]

PREPARED STATEMENT OF J. MARTIN EMERSON
PRESIDENT, AMERICAN FEDERATION OF MUSICIANS

BEFORE THE SUBCOMMITTEE ON LABOR OF THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE REGARDING THE PEFORMING ARTS LABOR RELATIONS AMENDMENTS OF 1987 SENATE BILL 1346

Good afternoon, Mr. Chairman and members of the Subcommittee. My name is J. Martin Emerson. I am the International President of the American Federation of Musicians, a labor organization which represents approximately 200,000 professional musicians.

First, I want to thank you for this opportunity to explain why the AFM supports the passage of Senate Bill 1346. On a personal note, this experience is noteworthy for me, since it is the first time I have appeared before the Senate or the House since taking office as President of the AFM in September, 1987. The comments I will make today are informed not only by my lifetime as a union official, but also by experiences accumulated in forty years as a performing musician--a trombone player.

Mr. Chairman and Members, since the 1970's there has been a great deal of confusion about the application of our federal labor laws to the performing musician. This confusion resulted from the unique character of the music industry, and from the manner in which the National Labor Relations Act was applied to deprive many, many musicians of the ability to exercise rights historically available to workers in every other walk of American life. The consequence has been that musicians are left unable to engage in concerted activity, and thereby improve their professional status and their financial lot in life. Of course, this is exactly opposite of the purpose of the NLRA, which, as you well know, was enacted to give American workers the right to organize and bargain collectively. Senate Bill 1346 is designed to correct this unhappy situation, and return to performing artists the rights of all other American workers.

Musicians are performing artists, who provide their services in many diverse settings -- from major symphony, opera and ballet orchestras, and motion picture and phonograph recording studios, to local hotels, theaters, clubs, lounges, and private social events.

A relatively small portion of our membership functions in a work pattern which is not so different from that of the mainstream American worker for whom the labor laws were designed. For instance, there is no question but that there is a traditional employer-employee relationship between musicians and the symphony, opera, and ballet associations for whom they work.

However, the overwhelming preponderance of musicians function under a completely different set of circumstances. People love music, and they don't only want to hear it in concert halls. People want to hear live music in big and small hotels, clubs and lounges. People want music at their weddings, bar mitzvahs, company dinner-dances, picnics and special celebrations of every size and variety. Thousands of musicians find their professional joy--and their livelihood--in filling this heartfelt need of people everywhere to dance, sing, listen and celebrate to live music.

These musicians enjoy the gratification of live performance, but the nature of such live engagements exacts a serious economic toll. Their employment is not steady; it is extremely casual and episodic. Instead of having an ongoing relationship with one employer, the musician will work for many successive purchasers of his services over the course of a month, a week, or even a single day. And, instead of a continuing relationship with the same co-employees, the musician will perform with many different musicians at different events. The musician's plight is compounded by the fact that to get enough work to support a family, he or she may have to travel, near or far, wherever the job opportunities exist. In short, the way of life of many musicians is characterized by great economic uncertainty that results from the frequently short term and casual nature of employment in our industry.

It is now clear that these very basic economic problems were compounded many fold by the application of the National Labor Relations Act some years after the enactment of the Taft-Hartley amendments. Prior thereto, the understanding throughout the industry was that musicians were employees, and the purchasers of their services were their employers. But in the 1970's, the National Labor Relations Board and the courts, in a series of ill-advised decisions, developed the doctrine that these musicians were not the employees of the purchasers of their services. Since the labor laws apply only to employer-employee relationships, the upshot of these rulings was that purchasers of musical services in the situations I have just described could no longer be compelled to bargain with the musicians' chosen representatives. All over the country, hotels and lounges were free to refuse to bargain with the AFM or its affiliated locals. In addition, the performing musicians were effectively denied their right to engage in strikes and other concerted actions protected by Section 7 of the NLRA.

As I address this distinguished committee today, it is hard to put into words just how much confusion resulted from those ill-advised decisions. To try to do so, I need first to explain one more unique aspect of the music industry. Frequently, one musician assumes the role of "leader" of an orchestra or band. A purchaser of musical services contracts with the leader. The leader makes the necessary arrangements to obtain the services of other musicians (called "sidemen"), and together they perform the engagement. Often the musician is a leader for one engagement, but a sideman for another engagement. The question arose over and over again: who was the musicians' primary employer for the purposes of the National Labor Relations Act? If the musicians had a dispute about wages or terms of employment, against whom could they engage in protected concerted activity under the labor laws?

For example, take the situation of orchestra musicians hired for a limited three-week engagement at a hotel lounge.

The hotel hires them by contracting with their leader, and agreeing to pay each of them at a certain wage scale per night or per week. Now suppose the hotel reneges on its commitment by refusing to pay that wage scale? What are the musicians to do? Any other group of workers faced with a similar problem would be able to exercise lawful economic pressure against their immediate--or so-called "primary"--employer, the hotel. But the National Labor Relations Board has ruled that the hotel is not their employer, and, instead, is a "neutral" party to the dispute. That fiction deprives the musicians of the basic right to exert economic pressure on the hotel.

I could go on and on with these horror stories. Suppose the musicians' union has a labor dispute with a hotel lounge in a certain city. The hotel then contracts with an out-of-town union orchestra to perform services that would have been performed by striking musicians. Under well-settled labor law principles, the union should be able to urge the orchestra members to honor a strike. But under the Board rulings, the musicians are without a primary employment relationship to the hotel, and any union effort to discipline strike-breaking members would be a secondary boycott.

Mr. Chairman and Members of the Subcommittee, these are only a few examples of the problems confronting the AFM and its rank-and-file members. Multiply these examples by tens of thousands of hotels, lounges and clubs, and you begin to get an idea of the magnitude of the problem. Beginning in the 1970's, hundreds of unfair labor practice charges were filed against this great union because of the chaos and confusion generated by the NLRB's treatment of the relationship between musicians, leaders, and the purchasers of their services.

Our union, I can assure you, has tried to conform its behavior to the rulings of the National Labor Relations Board. Indeed, over the past decade the AFM and the Board have engaged in lengthy negotiations to clarify some of these issues and settle a huge number of pending cases. A settlement--or perhaps more accurately a series of settlements--were reached, which recognized the right of workers to organize and engage in concerted activity to protect their interests, but only in some circumstances. As I previously noted, I have been actively involved in the musicians' union for many, many years. I have also become familiar with the particular issues that are the subject of this statement. But upon conducting a review of these Board settlements soon after assuming the presidency of the AFM, I threw up my hands in dismay. The provisions distinguishing lawful primary from unlawful secondary activity are super-complex and super-technical, and, in any event, do not accord musicians the full scope of Section 7 rights enjoyed by other employees. What we need is a clear, common-sense clarification of the law, such as that provided by Senate Bill 1346.

When it became clear that the National Labor Relations Act applied unfairly to the garment and construction workers typically engaged in short-term employment, Congress recognized their special problems, and effectively addressed those problems. Accommodations for our industry could have -- indeed should have -- been sought and achieved at the same time. But at that time, the National Labor Relations Board had not yet clearly asserted jurisdiction over many performing arts employees, so the problems which I have described today had not yet even surfaced. So, by accident of history, the performing arts were not included in the legislation which addressed the problems created by the application of the Taft-Hartley Amendments to construction and garment industry workers.

I am pleased to say that Senate Bill 1346 corrects this accident of history. It extends the protections afforded to workers in the construction and garment industries to the similar workers in the performing arts.

To begin with, the bill amends the definition of an "employer" under the Act to make clear that the purchaser of musical services is an employer. In those cases where a leader is an employer, he is a joint employer with the purchaser. At the same time, the bill amends the definition of "employee" to make equally clear not only that sidemen are employees but also that an independent contractor hired to perform musical services--other than one who himself hires musicians -- is an employee. Thus, hotels and similarly situated entrepreneurs will no longer be able to evade their responsibilities to bargain collectively with the representatives chosen by their employee-musicians. The end result of these sorely needed definitional changes, hopefully, will be a return to a rational structure in our industry whereby performing musicians will regain their entitlement to act collectively during labor disputes with their employers.

Second, the bill amends Section 8(f) of the NLRA to allow performing artists, like construction workers, to enter into prehire agreements with their employers. It will also allow performing arts unions, like construction unions, to bargain for a union shop agreement requiring membership or dues equivalent payments within eight days of employment. This provision will operate for performing artists just as it does for construction workers: it merely accommodates their right to organize and bargain collectively, where they choose to do so, despite the realities of their short term employment patterns. Of course, employers will remain free to refuse to enter into prehire agreements. But many responsible employers will welcome the prehire agreement, since it will help achieve greater stability and predictability in employment costs and availability of the skilled performers who comprise our membership.

Third, the bill amends Section 8(e) of the NLRA to include the performing arts industry in the well-known exceptions to its application. Currently, employers and unions in the garment and construction industries are allowed to enter agreements whereby the employer will subcontract only to union employers. Congress recognized that these industries needed to be able to make such agreements, because the fragmented nature of production in these fields made it incredibly difficult for workers to achieve a decent standard of living through collective activity. I can only express my hope that the ability to make such agreements will have the same effect on performing artists as it has had on construction and garment workers--that is, to allow them to improve the standards in the profession generally, despite the fact that they serve many, many employers for brief periods of time.

Mr. Chairman and Members of the Subcommittee, we do not come before you today asking for major revisions of the labor laws. We ask only that Congress exercise its time honored role of enacting appropriate, carefully defined amendments to our labor laws, where, as here, experience with the application of the laws establishes the need for such amendments. Thank you very much for your time and attention.

INTERNATIONAL SECRETARIAT FOR ARTS,
MASS MEDIA AND ENTERTAINMENT TRADE UNIONS

President:
Walter Bacher, Austria
Vice-President/Treasurer:
John Wilson, Great Britain
Secretary:
Irène Robadey, Geneva
Auditors:
Paul Fruh, Switzerland
Michel Lesage, France
Regional Vice-Presidents:
Komla Agbeka, Togo
K. Saminathan, Malaysia
Pedro E. Alvarez, Argentina

Mr. Martin Emerson
President
American Federation of
Musicians
1501 Broadway

NEW YORK NY 10036

Date 2nd December 1987

Our ref. ENT/288 Your ref.

Subject.

Dear Brother Emerson,

ISETU/FIET, which represents forty-five organizations of actors, musicians, singers, dancers and other performing artists in thirty-eight countries around the world was informed, at its executive committee meeting, held in Geneva, November 23, 1987, of the problems that you have encountered regarding the application of certain labour laws in your country.

As you know, throughout the world collective bargaining is regarded as an essential democratic institution providing measures for settling disputes and encouraging cooperation between employees and employers. It is, therefore, disturbing to learn that many American musicians are deprived of the opportunity to participate in this process because the law - which is intended to further collective bargaining - does not take into account the unique way in which musicians are employed.

In your country, as in most other countries, many musicians are employed on an intermittent or casual basis. The term of their employment is usually very short. Therefore, it is essential that they be able to negotiate the conditions under which they will work prior to their being hired. And yet such agreements, as we understand it, are not permitted in the USA though they are permitted for other groups of workers. Furthermore, all bands, orchestras, and "groups" must have a musician/leader. By no stretch of the imagination can that leader be considered the employer. By defining the musician/leader as an employer the law makes it impossible for musicians to bargain collectively with the real employer, the owner of the hotel, restaurant, cabaret or other establishment where the musician may be employed.

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ISETU/FIET Secretariat
Avenue de Balexert 15 CH-1219 Châtelaine-Geneva Switzerland Telephone 96 27 33 Telegraphic address FEDINET Telex 28488 FIET CH

We could go on noting the areas in which musicians in your country seem to be denied full recourse to collective bargaining but we know that you and your colleagues are well aware of them. The net effect of these laws is to deny American musicians' basic rights which not only are enjoyed by their colleagues in other countries but are also guaranteed by such international conventions as ILO Convention No. 98.

We wish you success in your effort to rectify this appalling situation and look forward to the day when those musicians you represent will enjoy the full benefits of collective bargaining.

Yours sincerely,

Walter Bacher
President

Irène Robadey
Secretary

AFM
we are professionals

AMERICAN FEDERATION OF MUSICIANS
OF THE UNITED STATES AND CANADA
AFFILIATED WITH THE A.F.L.-C.I.O.
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REGISTERED

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February 23, 1988

Senator Howard M. Metzenbaum
Chairman
Subcommittee on Labor
Senate Committee on Labor & Human Resources
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

Enclosed are my answers to the written questions regarding the Performing Arts Labor Relations Amendment of 1987, Senate Bill 1346, submitted by members of the Subcommittee on Labor.

I would like to thank you and the Subcommittee for the opportunity to testify and respond to questions regarding this important legislation.

Sincerely,

J. Martin Emerson

J. Martin Emerson
President

Enclosure

ANSWERS OF J. MARTIN EMERSON, PRESIDENT, AMERICAN FEDERATION OF MUSICIANS, TO QUESTIONS SUBMITTED BY MEMBERS OF THE SUBCOMMITTEE ON LABOR REGARDING THE PERFORMING ARTS LABOR RELATIONS AMENDMENTS OF 1987, SENATE BILL 1346

Questions Submitted by Senator Humphrey

1. As I understand it, the AFM believes that existing NLRA law deprives many musicians and other entertainers rights that are available to most other workers. Is there anything in the NLRA which prohibits these individuals from joining and paying dues to the union, even assuming they are independent contractors? Is there anything that prevents them, assuming they are not prevented from joining the union, from designating the union as their exclusive bargaining agent for purposes of negotiating their work and working conditions? If there is nothing in the law that prevents the union from acting as the entertainers' agent, why do you believe that so few entertainers want the union to act in this capacity?

Answer:

The AFM is not suggesting that musicians are prevented from joining the union. The problem is that once they join, the AFM is prevented -- by the inequitable application of the labor laws to our unique industry -- from protecting their rights.

As I explained in my statement to the Subcommittee, in the 1970's the NLRB developed the twin doctrines that, first, musicians were independent contractors, and second, the purchasers of their services were not their employers. This left hotels and lounges free to refuse to bargain even though the musicians had chosen to be represented by the AFM, and even though the understanding in the industry had always been that musicians were employees of these hotels and lounges. In some cases, hotels repudiated years of prior bargaining with the union as a result of the NLRB decisions. I documented other problems caused by the "independent contractor" doctrine in my statement to the Subcommittee. For instance, even though in every other industry employees have a right to engage in lawful economic pressure against their primary employer, musicians are deprived of this right because the purchaser of their services is not considered to be their employer. The definitional changes in Senate Bill 1346 correct these problems.

In addition, as I explained in my statement to the Subcommittee, the transient nature of employment in much of our industry also prevents the union from assisting musicians who have chosen to join the AFM. Musicians hired for a two-week gig do not have sufficient time to organize and bargain in the usual manner. In the construction and garment industries, which also involve short-term, casual employment, this problem is solved by permitting pre-hire agreements. Senate Bill 1346 makes a similar accommodation to the realities of the performing arts industry.

2. S. 1346 carves out exceptions to the NLRA for performing artists similar to those which exist for garment and construction workers. Would you give detailed reasons as to why the AFM believes that performing artists are equatable to garment and construction workers to the extent that you are asking Congress to make a major change in existing labor law?

Answer:

First, I do not believe that we are asking the Congress to make major changes in existing labor law. Rather, we are asking Congress to do only what it has readily done before, that is, to make relatively minor adjustments in the labor law where it applies unfairly to a unique industry. These adjustments would only serve to ensure that performing artists have the same rights to collective activity as employees in other industries.

Performing artists are not "equatable" to garment or construction workers, any more than garment and construction workers are "equatable" to each other. But the AFM believes that the performing arts industry shares several unique characteristics with the garment and construction industries which set them all apart from the more familiar industrial union context.

All three industries are marked by casual employment. Unlike the factory worker who may have an ongoing relationship with one employer for many years, a construction worker will work for various employers on relatively short term jobs, just as a performing artist may work for many successive purchasers of his or her services over the course of a month or a week. This makes it difficult or impossible for employees to organize collectively despite their desire to do so, since they will have moved on to another employer long before they can organize a vote or bargain a contract. Notwithstanding the short term nature of employment, a highly skilled work force is needed in these industries.

Finally, the fragmented nature of these industries, with their many small employers, has made it particularly difficult for workers in them -- whether they be performing artists or construction workers -- to improve their wages and terms and conditions of employment. It has simply been too easy for an employer to evade legitimate union demands for decent wages and conditions -- by subcontracting work to a nonunion shop (in the case of the garment industry) or by refusing to hire artists who demand decent wages.

In the garment and construction industries, the ability to make pre-hire agreements and so-called "hot cargo" agreements has brought stability and improved working conditions. The hope of the AFM is that application of the pre-hire and hot cargo exceptions to the performing arts industry will have a similar positive effect.

3. Let's assume that S. 1346 is enacted into law. Let's also assume that I am a member of a 3-piece combo and we have decided that we would like to negotiate our own work arrangements rather than having the union do it for us or using the standard union contract. We want to arrange a gig at the Happy hotel, which has signed a hot cargo agreement with the AFM. Can we do it without joining the union? Assuming no hot cargo agreement has been signed, can the union picket the hotel if it decides to hire our combo? What if the hotel has signed a pre-hire agreement? Could our combo work there if we still refuse to join the union? Given these answers, are there any specific protections in S. 1346 for a combo such as ours which wants to continue to negotiate our own work without joining the union?

Anwer:

Senate Bill 1346 permits but does not require employers to make so-called "hot cargo" agreements to hire only union subcontractors. If the Happy Hotel has signed such an agreement with the AFM, it presumably will not be interested in hiring the Humphrey Combo.

Senate Bill 1346 extends to the performing arts industry the exceptions contained in the garment industry proviso to Section 8(e). This means that a union can picket an employer to seek its agreement to a "hot cargo" provision.

Nothing would keep the Humphrey Combo from performing at the Happy Hotel if the hotel signed a pre-hire agreement with the AFM, even if the combo decides not to join the union. Union membership is not a condition of hire under a pre-hire agreement. If the Humphrey Combo worked for less than seven days, the question of union membership would not arise at all. After seven days, the combo would have the choice of joining the union or merely paying a dues equivalent. Thus, it could continue to work at the Happy Hotel even if it never joined the AFM.

4. S. 1346, by a legal fiction which you readily acknowledge, would make independent contractor performing artists "employees", and purchasers "employers", for purposes of the NLRA. You insist that the change would apply only for purposes of the NLRA. Given the fact that federal regulatory agencies regularly look to statutory applications when interpreting the term independent contractor, what assurance can you give that the IRS will not adopt the new NLRA definition for purposes of applying tax law requirements? What about the Labor Department in applying Fair Labor Standards Act, ERISA, and other laws which it administers? What about EEOC and Title VII of the Civil Rights Acts and the Age Discrimination Act? Is there anything in S. 1346 that would prevent these agencies from adopting this legal fiction for their own purposes? How would you suggest Congress respond to make certain that the change be limited only to the NLRA?

Answer:

First of all, I do not agree that Senate Bill 1346 creates a legal fiction. Rather, the bill restores an accurate definition of the employer-employee relationship in the music industry. As I pointed out in my statement to the Subcommittee, the universal understanding in the music industry prior to the 1970's was that the purchaser of musical services was an employer. Such purchasers -- for example, hotels -- regularly bargained with the chosen representatives of the musicians they employed. It was the ill-advised decisions of the National Labor Relations Board in the 1970's that created a legal fiction, that is, that hotels and similar establishments were not employers of the musicians they hired to perform.

Nothing in the bill on its face affects the Internal Revenue Code, the Fair Labor Standards Act, ERISA, or any other law. Further, the sponsors of the bill have repeatedly stated that their legislative intent is to leave the tax code and other legislation unaffected. I know of no reason to expect that federal agencies will be led by the passage of Senate Bill 1346 to depart in any way from their established analyses of the term "independent contractor."

Questions Submitted By Senator Howard M. Metzenbaum

1. How would this bill impact on an employer's ability to hire the musicians of his or her choosing? Would the musicians' union, as is alleged by some opponents of this legislation, have sole control over who is hired in the industry?

Answer:

Nothing in Senate Bill 1346 can alter the employer's ability to hire musicians of his or her own choosing, nor give "sole control" over hiring to the musicians' union.

Since there is clearly no basis for the objection that the bill gives control over hiring to the unions, I am at a loss to understand these allegations. Perhaps they are merely veiled objections to the union security agreements which are already allowed under our labor laws. Even without the amendments contained in the bill, unions and employers can agree to valid union security agreements whereby employees must either become members of the union on or after the thirtieth day of employment or pay a dues equivalent. The bill would allow -- but not require -- employers to negotiate pre-hire agreements containing union security provisions requiring a new hire to join or pay a dues equivalent within eight (rather than thirty-one) days.

Such union security agreements do not amount to "compulsory unionism." Under them, no one is forced to participate in the union or do anything other than pay a dues equivalent. Thus, the agreements act as a legitimate protection of unions against "free-riders" -- those who would accept the benefits of collective activity without contributing in any way toward its costs.

In addition, there are important limitations on union security provisions. They are not enforceable in right to work states. Even outside of right to work states, employers are free to refuse to agree to them. And, nothing in them prevents employees --including those working under pre-hire agreements -- from petitioning the NLRB for elections to decertify their unions.

In any event, a union security agreement does not have the effect of giving a union control over who an employer hires.

2. How would this bill affect a person who wants to hire a band for a wedding or bar mitzvah? I think there is some concern that this bill could impose restrictions on people who want to hire musicians for a one-time, casual engagement, and I would be interested in your comments in that regard.

Answer:

This bill would not affect such a person at all, since the National Labor Relations Act does not apply to any employer whose activities do not affect interstate commerce. The person or family who wants to hire a band to play at a wedding or bar mitzvah will not have enough effect on interstate commerce to fall within the coverage of the Act.

Even where an employer's activities do affect interstate commerce, the National Labor Relations Board declines to assert jurisdiction unless the employer's business meets certain monetary minimums well above the level that would be involved in a private party, wedding or family affair.

Question Submitted By Senator Spark M. Matsunaga

1. How would you suggest that hotel and lounge employers protect themselves against unfair labor charges stemming from the actions of orchestra leaders who have collective bargaining agreements with their band members?

Answer:

The simple answer is that hotel and lounge employers have nothing to protect themselves against. In all the years I have been involved with the American Federation of Musicians there has never been an instance of the AFM or an AFM local charging a hotel or lounge employer with an unfair labor practice based on the actions of an orchestra leader. This is not an accident. Rather, the structure of the industry makes it all but impossible for such a situation to arise.

First of all, out of some 450 AFM locals, no more than a handful have collective bargaining agreements with orchestra leaders -- typically also members -- who employ sidemen. Second, these orchestra leaders contract virtually exclusively for single night engagements at private parties, weddings, bar mitzvahs and the like. As I made clear in answer to Senator Metzenbaum's question, neither the National Labor Relations Act nor the amendments proposed in Senate Bill 1346 apply to such employment situations.

In short, the mere handful of orchestra leaders who have collective bargaining relationships with AFM locals simply do not work in the hotel and lounge segment of the entertainment industry.

Senator Matsunaga. Mr. Collins.

Mr. Collins. Mr. Chairman, Members of the Subcommittee, my name is Jay Collins. I am a resident of the State of Tennessee and President of Local 257 of the American Federation of Musicians in Nashville, Tennessee, with a membership of approximately 3,400 musicians. I hold degrees in music from the University of Miami and East Carolina University, including a Ph.D. from Vanderbilt University.

For 12 years, I have taught the business side of the entertainment and music business at Belmont College in Nashville, Tennessee, where students may major in this career area.

I have been a professional musician for 37 years, and during all of that time have remained a member in good standing of the American Federation of Musicians. I have personally performed in nearly every imaginable kind of establishment where live music is performed. In so doing, I have experienced many of the problems that have been cited to me by fellow musicians that are typically encountered as they move from job to job in pursuing their performing careers.

I chose to give up my privilege to perform as a musician and arranger to become President of the Nashville Musicians Union and dedicate my background and experience to assisting professional musicians. It is for that reason that I appear before you today.

In Nashville, many of our musicians enjoy the opportunity to participate in sound recordings and television engagements. Their musicians union, the American Federation of Musicians, at the Federation level negotiates the working conditions and wages for that area of employment, which includes leaders and contractors as well as individual musicians.

Our musicians have long questioned why they should not have similar representation in the clubs, hotels, restaurants, and other live music venues where they perform.

It appears that confusion pertaining to this legislation lies in the fact that in order for our musicians to enjoy the privileges of the National Labor Relations Act they must, by virtue of the language of the NLRA itself, be designated as "employees", and the purchasers of their services be designated as "employers". This is precisely what this bill will do.

It appears that we are dealing with a problem of nomenclature. Artists' personal managers, who are knowledgeable about doing business in the State of California, are generally aware of the fact that in that State the Talent Agencies Act of 1978 and the Employment Agency Act, require that an individual involved in the procurement of, or attempt to procure, employment for an artist must be licensed by that State. Even though those individuals are "artist managers" they become known under that legislation as "talent agents".

In other words, while the practice of the industry may remain the same in terms of who is actually acting as the employer of the musicians, the change of nomenclature to call the purchaser the "employer" and the members of the entertainment group "employees" will then afford them protection under the NLRA, which is what we are seeking with the passage of S. 1346.

The jurisdiction of our local musicians union spans 3 States, including 35 counties in Tennessee, a right to work State, 25 counties in Kentucky, and 5 Illinois counties, both of which are non-right to work States. Therefore, we represent musicians in both right to work and non-right to work States.

Without the passage of this legislation, our local union is powerless to assist its members in such cases without fear of reprisals in the form of ill-informed, unfair labor practice charges being filed.

Many of our musician members travel extensively throughout the United States and have encountered many types of difficulty in working engagements at various types of establishments. For many, many years, as Nashville is well-known as the country music capital of the world, many of our travelling country music artists, taking their own bands with them, move throughout the country, and they have told me horror stories that I won't get into at this moment, but it is just absurd that our country can allow this to happen!

If a problem exists in terms of working conditions in an establishment, the fact that those members in a certain establishment are there for as little as one to seven days usually means that they endure these unsavory working conditions, whatever they may be, since their engagement is so short-lived, and then they move on to continue their performance schedule elsewhere, leaving those same unsavory working conditions for the next group that comes through, without the collective bargaining representative being allowed to go in and see that those are taken care of.

Another problem that we have encountered pertains to purchasers of musicians' services who coerce musicians to sign individual contracts calling for below-scale payments and other working conditions not necessarily favorable to those musicians.

I just left a meeting yesterday where such a large employer is involved in this very kind of practice.

In closing, I wish to emphatically submit to this esteemed body of lawmakers for our proud democracy that it is to me out of character for our country to permit such an inequity to continue against a segment of our professional work force for such a long period of time, when this bill, S. 1346, is so simply fashioned, to correct such a complexity confronting our entertainment industry.

We are persistent in appealing to the ladies and gentlemen of the Congress of the United States for passage of this legislation. The professional musicians of American will applaud you for many years to come, for returning them to the ranks of those who are privileged to enjoy the provisions of the NLRA.

Thank you for extending to me the esteemed privilege of testifying here today. The professional musicians served by our Local Union in Tennessee, Kentucky and Illinois thank you as well. We only pray that you will give the utmost consideration to our plight, and that you will help us to move this legislation forward posthaste, with vim and vigor, until it becomes law.

We will be forever grateful. Thank you.

Senator **Matsunaga**. Thank you, Mr. Collins. You concluded in good time.

[The prepared statement of Mr. Collins follows:]

AMERICAN FEDERATION OF MUSICIANS - LOCAL No. 257
Nashville Association of Musicians
11 MUSIC CIRCLE NORTH - P.O. BOX 120399 - NASHVILLE TN 37212-9990
TELEPHONE (615) 244-9514
JAY COLLINS, President VIC WILLIS, Secretary - Treasurer

December 8, 1987

Senator Howard M. Metzenbaum, Chairman
Subcommittee on Labor
United States Senate
428 Dirksen Senate Office Building
Washington, DC 20510

Mr. Chairman, Members of the Subcommittee;

My name is Jay Collins. I am a resident of the State of Tennessee and President of Local 257 of the American Federation of Musicians in Nashville, Tennessee, with a membership of approximately 3,400 musicians. I hold degrees in music from the University of Miami and East Carolina University, including a Ph.D. from Vanderbilt University. For twelve years now I have taught the business side of the entertainment and music business at Belmont College in Nashville, Tennessee, where students may major in this career area.

I have been a professional musician for 37 years, and during all of that time have remained a member in good standing of the American Federation of Musicians. I have personally performed in nearly every imaginable kind of establishment where live music is performed. In so doing, I have experienced many of the problems that have been cited to me by fellow musicians that are typically encountered as they move from job-to-job in pursuing their performing careers. I chose to give up my privilege to perform as a musician and arranger to become President of the Nashville Musicians Union and dedicate my background and experience to assisting professional musicians. It is for that reason that I appear before you today.

When a group of our musicians performs a musical service for a purchaser of those services, that group includes a leader, and if the group is large enough to require it, a contractor. If S.1346, the Performing Arts Labor Relations Amendments Bill of 1987, becomes law, those leaders and contractors may then enjoy the representation of their collective bargaining representative in the establishments where they work for a buyer of their services. In Nashville many of our musicians enjoy the opportunity to participate in sound recordings and television engagements. Their musicians union, the A.F. of M., negotiates the working conditions and wages for that area of employment, which includes leaders and contractors, as well as individual musicians. Our musicians have long questioned why they should not have similar representation in the clubs, hotels, restaurants and other live-music venues where they perform.

It appears that confusion pertaining to this legislation lies in the fact that in order for our musicians to enjoy the privileges of the National Labor Relations Act, they must, by virtue of the language of the NLRA itself, be designated as "employees", and the purchasers of their services be designated as "employers". This is precisely what this bill will do. Based on this, I would like to submit the following three (3) points:

(1) - Leaders and contractors on engagements would then be included in the collective bargaining process pertaining to their employment.

(2) - Leaders and contractors, including those who are already union members, who choose to do so, would have the option to act as joint-employers of musicians' services, since this legislation does not address the determination of tax responsibility. A legislative analysis of this issue was made by Vincent E. Treacy, Legislative Attorney, American Law Division of the Library of Congress, who concluded that, "while the status of individuals under labor law would be altered, there would be no change in their employment status for tax purposes under the internal revenue laws."

(3) - This bill does not affect those who sell live performances or otherwise arrange for engagements of performers-for-hire.

It appears that we are dealing with a problem of nomenclature. Artists' Personal Managers, who are knowledgable about doing business in the State of California, are generally aware of the fact that in that state the Talent Agencies Act of 1978 and the Employment Agency Act, require that an individual involved in the procurement of, or attempt to procure, employment for an artist, must be licensed by that state. Even though those individuals are "artist managers", they become known, under that legislation, as "talent agents". In other words, while the practice-of-the-industry may remain the same in terms of who is actually acting as the employer of the musicians, the change of nomenclature to call the purchaser the "employer" and the members of the entertainment group "employees" will then afford them protection under the NLRA, which is what we are seeking with the passage of S.1346.

The jurisdiction of our local musicians union spans three states, including thirty-five counties in Tennessee (a right-to-work state), twenty-five counties in Kentucky and five Illinois counties (both of which are non-right-to-work states). Therefore, we represent musicians in both right-to-work and non-right-to-work states. Without the passage of this legislation, our local union is powerless to assist its members in such cases without fear of reprisals in the form of ill-informed unfair labor practice charges being filed.

Senator Howard M. Metzenbaum
December 8, 1987
Page 3

Many of our musician-members travel extensively throughout the United States, and have encountered many types of difficulty in working engagements at various types of establishments. If a problem exists in terms of working conditions in that establishment, the fact that those members are in that establishment for as little as one to seven days usually means that they endure the unsavory working conditions, whatever they may be, since their engagement is so short-lived, and then they move on to continue their performance schedule elsewhere. This being the case, a new group of musicians arrive upon the scene at the previous establishment and endure the same unsatisfactory working conditions. With this legislation passed, it would then be possible for the local union to assist in representing either local or traveling musicians who perform in said establishment by negotiating with that establishment's purchaser of musicians' services to correct any prevailing adverse conditions.

Another problem that we have encountered pertains to purchasers of musicians' services who coerce musicians to sign individual contracts calling for below-scale payments and other working conditions, not necessarily favorable to those musicians. Those musicians have had no opportunity for input into the documents they are asked to sign, but they often do so to avoid problems with, and in order to be able to continue their employment with, those purchasers. The musicians ask their union to attempt to negotiate with those purchasers, but their union is powerless to do so without the benefit of this legislation.

In closing, I wish to emphatically submit to this esteemed body of law-makers for our proud Democracy, that it is out-of-character for our country to permit such an inequity to continue against a segment of our professional work-force for such a long period of time, when this bill, S.1346, is so simply fashioned, to correct such a complexity confronting our entertainment industry. We are persistent in appealing to the ladies and gentlemen of the Congress of the United States for passage of this legislation. The professional musicians of America will applaud you for many years to come, for returning them to the ranks of those who are privileged to enjoy the provisions of the National Labor Relations Amendment (NLRA).

Thank you for extending to me the esteemed privilege of testifying here today. The professional musicians served by our local union in Tennessee, Kentucky and Illinois thank you as well. We pray that you will give the utmost consideration to our plight, and that you will help us to move this legislation forward post-haste with vim and vigor until it becomes law. We'll be forever grateful. Thank you.

Jay Collins, President
AFM, Local 257

Senator Matsunaga. I have a number of questions which I would like to submit to you both in writing so that you can submit your responses for the record. However, there is a question which I would like to ask of you, Mr. Emerson.

Is it the American Federation of Musicians' understanding that this legislation would permit the union to engage in picketing in order to obtain a pre-hire agreement with an employer such as a hotel owner?

Mr. Emerson. My clear understanding is that it would not.

Senator Matsunaga. And so do you see any way of forcing a hotel owner to sign any such agreement?

Mr. Emerson. No, I do not, sir, only if it would be mutual.

Senator Matsunaga. Now looking at it from the employers point of view, why would an employer wish to sign such an agreement?

Mr. Emerson. Well, we have many good employers that, based on equity, based on fairness, might want to enter into such an agreement with us. We have some employers who are absolutely proud of the fact that they engage union musicians and have agreements with the AFM. An AFM plaque was awarded, I think Mr. Collins told me just this afternoon, to a Nashville employer who displayed this AFM symbol, this plaque that they presented to the employer, and he was very, very proud to let the public know that the musicians performing there were union musicians.

One more item, Mr. Chairman, is that I think employers, being good businessmen as a rule, like to know what their costs are going to be down the line, so to speak. And that would afford them the opportunity to deal with future costs.

Senator Matsunaga. Thank you very much.

Now, Mr. Collins, we have heard charges that musicians do not support the bill, including the American Musicians Union and the Allied Musicians Union. How would you respond to these allegations?

Mr. Collins. Well, I would have to say that that is for the most part false. First of all, the two groups that you make reference to are not totally unknown to me, but are not considered in my estimation a major union representing a major segment of the professional musicians of this country.

One in particular, I believe, is somewhat associated with the NAOL, Mr. Charles Peterson's group, that these are not the same kinds of unions as I believe we are talking about. But I really do not know for sure. I, in fact, just happened to be talking about this with Ned Guthrie last night, asking him more about those organizations, and they are just not in the forefront of the unions representing musicians. But on the other hand, the American Federation of Musicians has a long established tradition of representing them. And I can say that, at least from our area in the South, that our musicians have signed petitions to our Congressmen; they have come in and given much verbal support. We have heard a few negatives, but those were clearly taken care of because they were based on untruths that have been circulated by the opposition to this legislation.

Senator Matsunaga. Well, thank you very much.

I have other questions which I would like to put to you, but because of the time constraints——

Mr. COLLINS. Could I just add one point, please?

Senator MATSUNAGA. Yes, go ahead.

Mr. COLLINS. The word "represent" that is bandied about here in terms of these organizations "representing" the musicians, and the American Federation of Musicians "representing"—I would just like to make sure that it is clear that when the American Federation of Musicians speaks of "representing" its members, it is speaking of it in the clear context of the NLRA, just as an attorney "represents" a client. But in the sense of representation by the affiliate agents that are affiliated with, perhaps, the ITAA, it is incorrect for such an organization to say that they clearly represent all of those musicians, because the kind of representation they are talking about would be similar to the American Bar Association saying it represents the clients. It is only an affiliate relationship at an upper level.

Senator MATSUNAGA. Well, thank you very much, Mr. Emerson, Mr. Collins, Mr. Guthrie, Mr. Kaiser.

Mr. COLLINS. Thank you, sir.

Mr. EMERSON. Thank you, Mr. Chairman.

Senator MATSUNAGA. Our next panel of witnesses includes Mr. Jack Golodner, Director of the Department for Professional Employees of the AFL-CIO, and Mr. Alan Eisenberg, Executive Secretary of the Actors' Equity Association.

While we are waiting for the witnesses to take their seats, I have a statement here from Senator Metzenbaum, Chairman of the Subcommittee, and a statement from Senator Pell, and without objection their statements will be included in the record immediately following mine.

Mr. Golodner, we will be pleased to hear from you first.

STATEMENTS OF JACK GOLODNER, DIRECTOR, DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO, WASHINGTON, DC, AND ALAN EISENBERG, EXECUTIVE SECRETARY, ACTORS' EQUITY ASSOCIATION, NEW YORK, NY

Mr. GOLODNER. Thank you very much, Mr. Chairman. It is indeed a pleasure to be here with you this afternoon.

I am here in behalf of the Department for Professional Employees of the AFL-CIO and indeed for the AFL-CIO itself.

Today, Mr. Chairman, there are approximately 340,000 men and women in the United States who have trained as performing artists and who are pursuing these disciplines as careers. But presently, few of these artists in the U.S. are able to work regularly at their profession because of the relatively small number of available jobs.

A 1980 survey of performing artists found that a majority of actors and musicians worked 100 days or less in their field and that they had 7 or more employers in a single years.

And earnings are as sparse as employment. I know that * * * with six- and seven-figure salaries create the image of the performing artist in the popular mind, but the reality is very much different. Less than one percent of all performing artists earn such salaries, and the 1980 study I just referred to found that about 31 percent of all actors and 25 percent of all musicians and their families together were working at or below the poverty level as established for determining eligibility under the CETA Program. I can assure you that, unfortunately, those conditions persist today.

Probably because of these factors, the arts and entertainment industry is one of the most highly-unionized sectors of our economy and has been for many years. The American Federation of Musicians was founded in 1896, and Actors' Equity Association was established 17 years later in 1913.

The insecurities wrought by patterns of intermittent employment, long periods of unemployment and meager financial returns when compounded by exploitive employing organizations led most performing artists early on to seek collective bargaining and union association as a way of addressing these problems in a constructive manner.

It is ironic, therefore, that a law intended to encourage such activity in this country has been held to offer these people no support whatever and indeed has been used to frustrate their efforts to seek meaningful participation in the economic decisions that affect their professions and their careers.

The arts and entertainment industry, and particularly the live performance area, is one which has no other close counterpart. Relationships in that industry between employers and employees and their unions evolved over long periods of time, are intricate and unique, and do not accommodate easily to some of the provisions of the National Labor Relations Act, which was drafted with more traditional industries and employer-employee relationships in mind.

The NLRA of course does apply to the arts and entertainment industry, but how that came to be does much to explain the necessity for the legislation before you.

As almost everyone knows, the NLRA or Wagner Act was enacted in 1935 and established as national policy that employees should be protected in their rights to organize into labor unions and engage in collective bargaining concerning their wages and working conditions. Thereafter, at 12-year intervals the Taft-Hartley and Landrum-Griffin Acts were passed amending the NLRA. Among the changes made were the provisions in the latter amending sections 8(e) and 8(f) of the NLRA and giving statutory recognition to certain idiosyncratic practices in the building and construction and clothing and apparel industries. In these amendments, Congress recognized that the work-a-day realities of those industries required special treatment in the law.

During this entire period, the NLRB exercised no jurisdiction over the arts and entertainment industry and indicated no intent to do so. Collective bargaining in that industry was nevertheless effective in resolving labor issues and disputes and promoting amicable, stable relationships.

But then, in the mid-1960s, the Board did assert jurisdiction over the live performing arts, to the consternation of employers and employees and their unions in that industry.

From that time until today, it has been impossible to mesh the provisions of the NLRA with certain immutable conditions, practices and relationships in the industry. As a result, unions in the industry have been and are severely handicapped in representing the interests of their members, and the right of many thousands of these employees to engage in collective bargaining—a right affirmed in domestic law and in international conventions—is denied them.

Surely, Congress did not intend this to happen. Yet, performing artists and many others in our country and throughout the world are appalled that this situation has occurred and is allowed to continue.

Mr. Chairman, for the reasons I have described—high unemployment, intense competition for jobs, low incomes—performing artists desperately need effective union representation and fair collective bargaining, which cannot be provided them under the NLRA as it is presently written. Enactment of your bill, S.1346, at the earliest possible time is essential to the welfare of performing artists and our democratic society.

Thank you very much, Mr. Chairman.

Senator MATSUNAGA. Thank you very much, Mr. Golodner. You completed in time, with even a minute to spare.

Mr. GOLODNER. Well, can I just add, Mr. Chairman—I think I did not ask before but I would like my statement entered into the record in its entirety.

Senator MATSUNAGA. Your statement will appear in the record as though presented in full.

Mr. GOLODNER. Thank you.

[The prepared statement of Mr. Golodner follows:]

STATEMENT
OF
JACK GOLODNER, DIRECTOR
DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
IN SUPPORT OF THE
PERFORMING ARTS LABOR RELATIONS AMENDMENTS
S. 1346

DECEMBER 10, 1987

I am Jack Golodner, Director of the Department for Professional Employees (DPE) of the AFL-CIO. I am here today to affirm the strong support of the AFL-CIO and this Department for the Performing Arts Labor Relations Amendments, S. 1346.

While the AFL-CIO needs no introduction to the Senate Labor Subcommittee, perhaps a few words about the Department would be helpful. The DPE is a constitutional department of the AFL-CIO comprised of twenty-eight national and international unions (list attached). Approximately 3 million professional employees are numbered among the members of these unions including substantially all of the performing artists for whom enactment of the Performing Arts Labor Relations Amendments is so vital.

To fully appreciate the need for S. 1346 requires not only some understanding of the arts and entertainment industry but also of the labor relations law which applies in that industry.

THE ARTS AND ENTERTAINMENT INDUSTRY

Today, about 340,000 men and women in the United States have trained to be performing artists and are pursuing these disciplines as careers. These people are among a nation's most precious human assets in that they are interpreters and communicators of the culture both domestically and internationally. Presently, few of these artists in the U.S. are able to work regularly at their profession because of the relatively small number of available jobs. A 1980 survey* of performing artists found that a majority of actors and musicians worked 100 days or less in their fields, and that, they had seven or more employers in a single year.

And, earnings are as sparse as employment. Often stars with six and seven figure salaries create the image of the performing artist in the popular mind, but the reality is quite different. Less than 1% of all performing artists earn such salaries, and the 1980 study I just referred to found that about 31% of all actors and 25% of all musicians and their families were living at or below the poverty level as established for determining eligibility in the Comprehensive Employment and Training Program. I can assure you that unfortunately those conditions persist today.

Paradoxically, the arts and entertainment industry is one of the most highly unionized sectors of our economy and has been for many years. For example, the American Federation of Musicians was founded in 1896 and Actors' Equity Association was established 17 years later in 1913. The insecurities wrought by patterns of intermittent employment, long periods of unemployment and meager financial returns when compounded by exploitive employing organizations led most of these artists, early on, to seek collective bargaining and union association as a way of addressing these problems in a constructive manner. It is ironic therefore, that a law intended to encourage such activity has been held to offer these people no support whatever and, indeed, has been used to frustrate their efforts to seek meaningful participation in the economic decisions that affect their professions and their careers.

The arts and entertainment industry is one which has no other close counterpart. Relationships between employers and employees and their unions evolved over long periods of time, are intricate and unique and do not accommodate to some of the provisions of the National Labor Relations Act which was drafted with more traditional industries and employer-employee relationships in mind.

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* Ruttenberg, Friedman, Kilgallon, Gutchess and Associates, Inc. Working and Not Working in the Performing Arts: A Survey of Employment, Underemployment and Unemployment Among Performing Artists in 1980, The Labor Institute for Human Enrichment, Inc., Washington, D.C., December 1981.

THE NLRA AND THE ARTS AND ENTERTAINMENT INDUSTRY

The National Labor Relations Act (NLRA), of course, does apply to the arts and entertainment industry, but how that came to be does much to explain the necessity for the Performing Arts Labor Relations Amendments.

As almost everyone in the room probably knows, the NLRA or Wagner Act was enacted in 1935 and established as national policy that employees should be protected in their rights to organize into labor unions and engage in collective bargaining concerning their wages and working conditions. Thereafter, at twelve year intervals the Taft-Hartley and Landrum-Griffin Acts were passed amending the NLRA. Among the changes made by these pieces of amendatory legislation were the provisions in the latter (enacted in 1959) amending sections 8(e) and 8(f) of the NLRA and giving statutory recognition to certain idiosyncratic practices in the building and construction and clothing and apparel industries. In these amendments Congress recognized that the work-a-day realities of those industries required special treatment in the NLRA.

During this entire period the National Labor Relations Board exercised no jurisdiction over the arts and entertainment industry and indicated no intent to do so. Collective bargaining in that industry was, nevertheless, effective in resolving labor issues and disputes.

Then, in the mid 1960s, the Board did assert jurisdiction over the arts and entertainment industry to the consternation of employers and employees and their unions in that industry. From that time until today it has been impossible to mesh the provisions of the NLRA with certain immutable conditions, practices and relationships in the arts and entertainment industry. As a result unions in the industry have been and are severely handicapped in representing the interests of their members and the right of many thousands of these employees to engage in collective bargaining -- a right affirmed in domestic law and in international conventions -- is denied them. Surely, Congress did not intend this to happen. Yet, performing artists and many others in our country and throughout the world are appalled that this situation has occurred and is allowed to continue.

Mr. Chairman, for the reasons I have described -- high unemployment, intense competition for jobs, low income -- performing artists desperately need effective union representation and fair collective bargaining which cannot be provided them under the NLRA as it is presently written. Enactment of your bill, S. 1346, at the earliest possible time is essential to the welfare of performing artists and our democratic society.

AFFILIATES OF THE DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO

Actors' Equity Association

American Federation of Government Employees

American Federation of Musicians

American Federation of State, County and Municipal Employees

American Federation of Teachers

American Federation of Television and Radio Artists

American Guild of Musical Artists

Association of Theatrical Press Agents and Managers

Communications Workers of America

Federation of Professional Athletes

International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators

International Association of Machinists & Aerospace Workers

International Brotherhood of Electrical Workers

International Federation of Professional and Technical Engineers

International Ladies' Garment Workers' Union

International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers

International Union of Operating Engineers

International Union, United Automobile, Aerospace & Agricultural Implement Workers of America

National Association of Broadcast Employees and Technicians

National Union of Hospital & Health Care Employees

Office and Professional Employees International Union

Retail, Wholesale and Department Store Union

Screen Actors Guild

Seafarers International Union

Service Employees International Union

Transportation • Communications Union

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

United Steelworkers of America

Senator **Matsunaga**. We would be happy to hear from you now, Mr. Eisenberg.

Mr. **Eisenberg**. Thank you, Mr. Chairman.

I am Alan Eisenberg, the Executive Secretary of Actors' Equity, the labor organization which represents over 39,000 professional actors and stage managers who work in the American theater.

Senator **Matsunaga**. Will you draw that mike closer to you, please?

Mr. **Eisenberg**. Certainly. We try to work without mikes.

We are grateful for this opportunity to make our views known in connection with the bill before you.

Actors' Equity strongly supports S. 1346 and recommends its passage. We are in agreement with its aims and purposes and in particular with the provision of the bill which would amend section 8(f) of the National Labor Relations Act by extending to the entertainment industry, except broadcast and motion pictures, the pre-hire and seven-day union security provision currently applicable to the construction industry.

In the 1959 Landrum-Griffin amendment to Taft-Hartley, Congress acknowledged the uniqueness of the construction industry by permitting the execution of pre-hire agreements and by validating seven-day union security provisions for these workers rather than the 30-day provision applicable to all others. This special proviso for the construction industry has served that industry well in the many years since its enactment.

We ask that you extend to us the same treatment given that industry for, like the construction industry, we have a specific need engendered by the peculiar nature of our employment patterns.

As with the construction industry, theatrical stage performers share a high degree of transient employment. Like the construction industry, there is an absolute need for the employer to know in advance his labor costs in order to budget property and to have the security in knowing that when workers are hired, there will be no threat of a work stoppage.

Like the construction industry, too, the entertainment field is marked by casual employment, the need for a highly skilled work force, and is replete with noncontinuous employment.

Our records reveal that the performer today is likely to have in excess of a dozen employers in the industry within the course of a year. The actor now fortunate enough to be working and working on broadway may well appear at a regional theater here in Washington next week, in a dinner theater the following month, and subsequently be cast in an industrial show in Florida.

Actors and musicians, the nature of whose employment patterns closely resemble that of construction workers, should have been included in the special provision in 1959. For a variety of reasons, they were not. There was doubt, for example, that the live theater and its workers were subject to the National Labor Relations Act because of the largely local, rather than interstate, nature of the theater.

Additionally, the numbers of the affected persons at the time were considered rather small in contrast to the hundreds of thousands employed in the construction trades.

Justice surely has little to do with numbers. And more to the point, perhaps, whereas in 1959 Actors' Equity had a membership of less than 10,000, we have, as I previously noted, some 39,000 actors and stage managers today.

Together with musicians, performing artists now exceed a quarter of a million people in this country.

Not only have we grown in numbers; the theater industry in the country has grown in stature—witness the growth of the National Endowment and the expansion of State Arts Councils in every State in this country. Equity and the theater, as a result, have certainly gained greater attention.

Indeed, it is important to note the general impact which the theater has had on the health and revitalization of our cities. As a result, tourism has flourished, and by all measures, each dollar of theatrical revenue produces four times that amount in related commercial activities. For this, we should all be grateful.

But it now becomes a matter of some urgency that this Committee and the Congress recognize that we be brought within the mainstream of the labor relations statute. While all of our contractual partners are free to hire the person most qualified in the employer's judgment to perform a job, both the employer and the union are intent on having the collective bargaining agreement apply to all persons hired and its protections extended to employer and employee alike.

In direct language, a 30-day provision makes no sense to us. An actor may rehearse a show which may open and close all within 30 days, without coming under the umbrella of union protection. This is precisely the sort of circumstance which gave rise to the modification of the law for construction workers.

Equity prides itself on being an open union, the key to admission being the ability to have the talent to get a job. In order to maintain the standard of wages and working conditions which we have achieved, it is absolutely essential that we continue to execute contracts with the employer in advance of the commencement of a particular production. And in order to provide a stability which is so essential to the theater industry and to assure that, in fact, the employee will perform according to the agreements which our union has negotiated.

To further highlight the short-term nature of our industry, I would like to advise the Committee that we have for years negotiated the concept of two weeks' employment provides pension credit for the year and additionally, subsequent to your last day of employment, you receive five months of health coverage, as examples of the transient nature of our work.

And the last related point is that in the tax bill that was passed last year, Congress itself recognized the peculiar nature of our work characteristics by making a specific performing labor arts amendment applicable to actors who earn less than $16,000 per year.

Finally, I am requesting that my entire written statement be entered into the record.

Senator MATSUNAGA. Thank you very much, Mr. Eisenberg.

[The prepared statement of Mr. Eisenberg follows:]

STATEMENT BY ALAN EISENBERG,
EXECUTIVE SECRETARY, ACTORS' EQUITY ASSOCIATION
BEFORE THE SUB-COMMITTEE ON LABOR
OF THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE
DECEMBER 10, 1987

Mr. Chairman, Members of the Committee:

I appear before you today in my capacity as the Executive Secretary of Actors' Equity Association, the labor organization currently representing over 39,000 professional performers in the live American theatre. I speak for these performers also on behalf of our President, Colleen Dewhurst, and our President Emeritus, Theodore Bikel, many of whose words from prior appearances before Congress on this subject, I echo today. We are grateful for this opportunity to make our views known to you in connection with the bill before you.

Actors' Equity strongly supports S 1346 and recommends its passage. We are in agreement with its aim and purpose and, in particular, with the provision of the bill which would amend section 8(f) of the National Labor Relations Act by extending to the entertainment industry (except broadcast and motion pictures) the pre-hire and seven day union security provision currently applicable to the construction industry.

By way of some background, I ask you to recall the 1959 Landrum-Griffin amendment to the Taft-Hartley Act. At that time the construction industry persuaded the Congress of the need for special treatment based upon the specialized circumstances within their industry.

Congress acknowledged the uniqueness of the construction industry by permitting the execution of pre-hire agreements and by validating seven day union security provisions for these workers rather than the thirty day provision applicable to all others. This special proviso for the construction industry has served that industry well in the many years since its enactment.

We also note that this is not the first time Equity is seeking this amendment. We tried in 1966 and again in 1977. Yet again, we ask that you extend to us the same treatment given the construction industry, for like that industry, we have a specific need engendered by the peculiar nature of our employment patterns.

As with the construction industry, theatrical stage performers share a high degree of transient employment. Further, the absence of a clearly defined labor force in the theatre, together with the ordinary delays in collective bargaining, makes negotiations in the theatre practically impossible. Like the construction industry, there is an absolute need for the employer to know in advance his labor costs in order to budget properly and to have the security in knowing that when workers are hired there will be no threat of a work stoppage.

Like the construction industry, too, the entertainment field is marked by casual employment, the need for a highly skilled work force and is replete with non-continuous employment. Our records reveal that the performer today is likely to have in excess of a dozen employers in the industry within the course of a year. The actor now working on Broadway may well appear on a Regional theatre stage in Minneapolis next week, in a Dinner Theatre in Texas the following month, and subsequently be cast in an Industrial show in Florida.

Actors and musicians -- the nature of whose employment patterns closely resemble that of construction workers, should have been included in the special provision in 1959. For a variety of reasons they were not. There was doubt, for example, that the live theatre and its workers were subject to the National Labor Relations Act because of the largely local, rather than inter-state, nature of the theatre. Additionally, the numbers of the affected persons at that time were considered rather small in contrast to the hundreds of thousands employed in the construction trades. Justice surely has little to do with numbers. Moreover, for the Committee's information, in 1959 Actors' Equity had a membership of less than 10,000 performers. Today, as noted, our membership is in excess of 39,000 members. Together with musicians, performing artists now exceed 250,000 people!

Not only have we grown in numbers, the theatre industry in the country has grown in stature -- witness the growth in the National Endowment for the Arts and the expansion of State Arts Councils -- Equity and the theatre have gained greater attention. Indeed, it is important to note the general impact which the theatre has had on the health and revitalization of our cities. As a result, tourism has florished and, by all measures, each dollar of theatrical revenue produces four times that amount in related commercial activities. For this we are thankful.

But, it now becomes a matter of some urgency that this Committee and the Congress recognize that we be brought within the mainstream of the labor relations statute. While all of our contractual partners are free to hire the person most qualified in the employer's judgment to perform a job, both the employer and the union are intent on having the collective bargaining agreement apply to all persons hired and its protection extended to employer and employee alike. In blunt language, a thirty-day provision makes no sense for us: An actor can rehearse a show which may open and close, all within thirty days, without coming under the umbrella of union protection. This is precisely the sort of circumstance which gave rise to the modification of the Law for construction workers.

Equity prides itself in running an open union, the key to admission being the ability to find an employer who will give you the job. In order to maintain the standard of wages and working conditions we have achieved, however, it is absolutely essential that we continue to execute contracts with the employer groups in advance of the commencement of a particular production. And in order to provide a stability which is so essential to the theatre industry and to assure that, in fact, the employee will perform according to the Agreements which our union has negotiated, the seven-day provision is an absolute necessity.

To further highlight for you the short term nature of theatrical industry employment, I would like to advise this Committee that we have for many years negotiated with our employers Pension and Health Funds designed specifically to reflect this unique pattern of employment. In our industry, an actor need only work two weeks per year in order to receive Pension credit for the year and only three weeks to guarantee Health Insurance coverage. Additionally, since so much of our employment is short term, our Health plan also provides for continued coverage to the performer, for up to five months, after the show closes. In each case the 30 day provision is essentially meaningless for our industry.

Finally, we ask you to acknowledge this special request of ours in much the same manner as the full Congress did last year when a special provision was provided for low income performing artists in the Tax Reform Act of 1986. This provision was included precisely because the Congress acknowledged that our industry does have unusual work characteristics -- marked by casual and notoriously short term employment. We ask you to make a similar acknowledgement of the special nature of our industry by extending the section 8(f) provision of the law to include, in addition to the construction industry, theatrical stage employees and musicians.

In conclusion, current provisions of the National Labor Relations Act are clearly at odds with the realities and long standing labor relations practices in the live theatre. Enactment of this amendment would be a major step towards improving labor-management relations in the theatre.

Thank you.

Senator MATSUNAGA. Mr. Golodner, would you comment on the assertion that this bill will restrict the freedom of workers who choose not to join the union?

Mr. GOLODNER. I don't see how they will be restricted any more than other workers are in the society. What the bill does, as I understand it, is to bring performers to a place where many other workers are today, in enjoying the benefits of collective bargaining.

Those performers who do not choose to join the union probably won't join the union.

Senator MATSUNAGA. Mr. Eisenberg, do you see anything in this bill which would, if passed, allow the union to use economic coercion to force employers to sign such agreement?

Mr. EISENBERG. Absolutely not. President Emerson specifically acknowledged the concept that picketing would be prohibited for purposes to obtain the pre-hire, and we support that idea. Picketing is not necessary. The coercion is not necessary. We categorically reject the idea.

And just to add one point to what Mr. Golodner noted with reference to your question, Senator, membership in our union is not our problem. Earnings might be our problem and jobs might be our problem, but as we noted in the report, we now have 39,000 people; and when we started making this request to the Congress that we be included in the pre-hire concept, when Ralph Bellamy was our President, we had 10,000 members. So forcing people to join our union has never been our problem. People wish to join our union.

Senator MATSUNAGA. Well, thank you very much, Mr. Golodner and Mr. Eisenberg.

Mr. EISENBERG. Thank you very much, Senator.

Mr. GOLODNER. Thank you.

Senator MATSUNAGA. If we have any further questions, we will submit them to you in writing.

Mr. EISENBERG. We appreciate the time, sir.

Senator MATSUNAGA. The next panel of witnesses consists of Mr. Thom Sweet, National Association of Orchestra Leaders, Minneapolis, Minnesota, and Mr. Bill Heaberlin, International Theatrical Agencies Association of New York. And you are accompanied by counsel, Mr. Tysse.

We would be happy to hear from you first, Mr. Sweet.

STATEMENTS OF THOMAS E. SWEET, NATIONAL ASSOCIATION OF ORCHESTRA LEADERS, MINNEAPOLIS, MN, AND WILLIAM A. HEABERLIN, CHAIRMAN, LEGISLATIVE AFFAIRS COMMITTEE, INTERNATIONAL THEATRICAL AGENCIES ASSOCIATION, NEW YORK, NY, ACCOMPANIED BY JOHN TYSSE, ITAA LEGISLATIVE COUNSEL

Mr. SWEET. Thank you, Mr. Chairman.

I would request that my written statement be entered into the record in its entirety, and I'll give my brief summary.

Senator MATSUNAGA. Without objection, it will be so done.

Mr. SWEET. Thank you. I am Thom Sweet, and I am here to speak in place of Charlie Peterson who, due to poor health, is unable to attend this hearing.

I represent the National Association of Orchestra Leaders and the Minnesota Association of Theatrical Agencies, of which I am the President.

We are adamantly against S.1346. I would like to clear up a couple of points here. The proponents of this bill claim that they cannot sign up their membership within 30 days; the union can and does sign up their membership immediately. They don't even have to be working at the time.

The NLRA and the Taft-Hartley Act does not deprive musicians of anything. They have the right to join unions now if they wish. What the proponents are asking for is the right to bargain for musicians that do not wish to join or be represented by a union. The proponents are not asking for the remedies of the law, but the intimidation 8(e) and 8(f).

As for the horror stories, basically, if the hotel reneges on a contract, the leader can take the hotel to court, and in turn, the sidemen can take the leader to court. If the contract is a good one, the sidemen can take the hotel to court also.

While this bill does not directly affect the tax status of musicians, again the ramifications are obvious. I would like to use an analogy. Mr. Spock on "Star Trek" would say, "If I were to drop a hammer on a plant with a positive gravitational pull, I need not see the hammer fall to know that it has indeed fallen."

I do not think anyone can be convinced that if musicians become employees for NLRB purposes, they will not be employees for IRS purposes.

Passing S.1346 would create the following chain of events:

(1) Independent contractors would become employees for tax purposes.

(2) The purchasers of live musical entertainment would be required to then withhold taxes, liability insurance, workmen's comp, social security, and other related benefits.

(3) Purchasers of live music entertainment would then take a good look at (a) whether or not the art form is worth the extra encumbrance of hiring someone to handle the deluge of paperwork that would occur for a venue that debuts a new band every week. And (b) whether it would be more cost-effective to hire a house band, and (c) whether it would be more cost-effective and less headache to put in a sound system. Either scenario (b) or (c) means a lot fewer places for musicians to perform their art form.

The live musical entertainment will be crippled for lack of places to play and money to be earned.

In conclusion let me say musicians do not wish to be nor should they be employees, and passing S.1346 would only produce mandatory unionism, a result that strikes at the heart of democracy and freedom of choice. For the sake of the entire music industry, please say no to these bills, and please do not refer this bill to Full Committee.

If I have time, I would like to defer to my colleague, Bill Heaberlin, and answer any questions you have.

Senator MATSUNAGA. Thank you very much, Mr. Sweet.

[The prepared statement of Mr. Sweet, with attachments and responses to Senator Matsunaga's questions follow:]

STATEMENT

OF

THOMAS E. SWEET

FOR

THE NATIONAL ASSOCIATION OF ORCHESTRA LEADERS

AND

THE MINNESOTA ASSOCIATION OF THEATRICAL AGENCIES

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

REGARDING

S. 1364 & H.R. 1638

DECEMBER 10, 1987

NATIONAL ASSOCIATION
OF ORCHESTRA LEADERS

34 METROPOLITAN OVAL
NEW YORK, N.Y. 10462
(212) 863-8997

MINNESOTA ASSOCIATION
OF THEATRICAL AGENCIES

P.O. BOX 28081
CRYSTAL, MN. 55428
(612) 535-7535

I am Thom Sweet, hear to speak in place of Charlie Peterson, who, do to poor health, is unable to attend this committee hearing.

I Represent the National Association of Orchestra Leaders (NAOL) whose members since 1959 include such statuses as:

1) Orchestra leaders (employers of musicians)
2) Partnerships-co-ops (Self-employed music groups)
3) Singles (individual musicians who always perform alone)
4) Contractors (Usually a performing member of an orchestra [See group #1 above] who for agreed extra-pay hires musicians for the involved orchestra leader employer)
5) Supervisors (of musicians) within the meaning of the Taft-Hartley Act.

I also represent the Minnesota Association of Theatrical Agencies, of which I am President, whose membership includes the 21 largest booking agencies in the Twin Cities (twin cities being possibly the third largest market of live musical entertainment in the nation). These agencies in turn represent thousands of musicians.

I also represent the Minnesota Bluegrass and Old-Time Association.

I also represent many people, whose signatures I have on petitions, that are also gravely concerned about the bills S.1346 & H.R.1638.

I also am a member of the Minnesota Music Academy and the Professional Live Entertainers Organization.

Since 1964 the AFM has presented 17 Bills. They are and were:

H.R. 11238	May 13, 1964
H.R. 8441	Jul 20, 1977
H.R. 7401	May 20, 1980
H.R. 7402	May 20, 1980
H.R. 4376	Aug 4, 1981
H.R. 4377	Aug 4, 1981
S. 2925	Sep 8, 1982
S. 2925	Sep 17, 1982
S. 281	Jan 25, 1983
H.R. 1758	Mar 2, 1983
H.R. 5107	Sep 1983
S. 670	Feb 18, 1985
H.R. 2759	Jun 13, 1985
H.R. 2760	Jun 13, 1985
H.R. 2761	Jun 13, 1985
H.R. 1638	Mar 17, 1987
S. 1346	Jun 9, 1987

These bills sought to reverse over 200 cases ruled on by the NLRB, some of the key cases are:

Bartels v Birmingham
(1947) 332 U.S. 126, 67 S.Ct. 1547

Carroll v American Federation of Musicians
295 F.2d 484, 486 (2 cir 1961)

Carroll et al v American Federation of Musicians of the U.S. and Can.et al
(C.A. 2, 1967) 372 F.2d 155

Carroll V Associated Musicians of Greater New York
183 F. Supp. 636 (S.D. N.Y. 1960);affirmed 284 F.2d 91

Chicago Federation of Musicians, Local10, Etc.
153 NLRB 68

Claim of Miller, Appeal of Amigone
(1941) 262 App. Div. 385,29 N.Y.S. 2d 51

Cutler v American Federation of Musicians of U.S. and Canada
(C.A 2,1963) 316 F.2nd 546 cert. den. 375 U.S. 941, 84 S.Ct. 346

Cutler v United States
(1960) 180 F. Supp. 360

Mark Hopkins Inc. v Cal. Emp. Etc. Com.
(1948) 86 C.A. 2d 15

Orchestra Leaders v Musical Society
(U.S.D.C. E.D.PA.,1962) 49 LRRM 3043

People v Grier
(1942) 53 C.A. Supp. 2d 841, 120 P.2d 207

Wiliams v U.S.
(C.A. 7, 1942) 126 F. 2d 129

Don Glasser, NATL. Assn. Orch. Ldrs. v AFM
(1966) 165 NLRB 110

Hilton et al v NLRB AFM Local #468
(1982) 2d cir. C.A.

Orchestra Leaders v AFM Local 802
225 NLRB No 74 - contempt

Orchestra Leaders v AFM Local 802
126 NLRB 29 - Court Enforced

These past attempts have failed for many obvious reasons.

These bills are unfounded. No consensus has.ever been established in support (by musicians) of this useless legislation.

The only people that are in support of this legilation, are the upper echelon of the unions who, (through their own laziness and poor business abilities) are losing musicians by the droves. There are ever increasing numbers of musicians appearing on the music scene but they are chosing not to be members of the union. Why? **There must be a reason.**

I therefore suggest that a study through an impartial advisory council be set up to determine whether or not a majority of preforming musicians even want these bills.

By the motion of the legilative pen and simple words, these bills could cripple the industry with the only purpose of propping up a failing union.

To pass any of these bills would erase the constitutional rights of thousands of Orchestra Leaders, Co-Ops, Singles, i.e. Independent Contractors by forcing them to become "employees" and compelling them to join a union without the freedom of choice.

The AFM misleads the congress by ridiculous comparisons.

This is not a class struggle, worker against management. We are talking about artists and purchasers of an art form. The purchaser does not tell the artist what color to paint a picture. If he likes the color, he buys it, period. If a puchaser thinks a particular band will attract more customers to his venue, he buys the performance. It's that simple.
The declaration of the Taft-Hartley Act, Sec. 1(b) states, "Industrial strife which interferes with the normal flow of commerce and the full production of articles and commodities for commerce,..". In the case of musicians there are no articles or commodities, only the preformance. More like Statesmen, musicians aquire their jobs by quality performance. Statesmen are not covered by this act either. **Are Senators next to be unionized?**

Reading of Section 8(e) of the Taft-Hartley Act dispells the alleged similarity of musicians with the garment and constuction industries. Neither union controlled industry has as its members employers, contractors, supervisors or partnerships. However the unions membership and representatives are inundated with the afore mentioned. I submit that this is the real problem. Rather than the AFM admit they are not a true union they seek to change the law by passing this self serving plea for special privileges.

What are the chances of any industry meeting the conditions of one (much less both) rare exemption granted by the Taft-Hartley Act??
The AFM would have you believe this has happened.
The garment industry, (with its sweat shops, their violent traditions and disregard for human rights), is the sole industry with the right to "Hot Cargo and Secondary Boycotts". This is far from the the case of musicians. Their civil or human rights are well in tact.
The AFM would also have you believe that like the construction industry, "Due to short-term nature of employment", the union must wait 30 days to sign up new members. **PURE BUNK!!** The AFM can and does sign new members anytime, even before they have jobs.

The AFM claims that they are being denied the right of "Representation for Collective Bargaining". This too is Pure Bunk". They do now and always have had the right to bargain collectively for their members. What they are asking for is the right to bargain for musicians that do not wish to join or be represented by the union.

The AFM, through this bill, wishes to change the status of the independent contractor (which is the case of most musicians). The reasoning is obvious. The membership and management of the AFM is inundated with independent contractors, and as I stated earlier, this is the real problem the union faces. The AFM is not a "True Union". Rather than get their act to gether by representing only "Sidemen" (musicians that work for the leader of the band), the AFM is requesting the change of musicians independent contractor status with "one fell swoop of a pen". I suggest if an "easy fell swoop" out of their predicement is what they want, the AFM should try and change the law to allow them to represent "Independent Contractors".

While this bill does not directly effect the tax status of musicians, again the ramifications are obvious. Spock, on Star Trek, would say, "If I were to drop a hammer on a planet with a positive gravitational pull, I need not see the hammer fall to know that it has indeed fallen....." I do not think anyone can be convinced that if musicians become employees for NLRB purposes, they will not be employees for IRS purposes in the future.

Passing S.1346 or H.R.1638 **would create** the following chain of events:

1. Independent contractors would become employees for tax purposes.
2. Purchasers of live musical entertainment would be required to with-hold taxes, liability insurance, workmens comp., social security, and other work related bennifits.
3. Purchasers of live musical entertainment would then take a good look at;
    A) whether or not the art form is worth the extra encumbrance of hiring some one to handle the deluge of paper work that would occur for a venue that debuts a new band every week,
    B) would it be more cost effective to hire one house band,
    C) would it be more cost effective and less headaches to put in a sound system.
4. Either scenario (B or C) means a lot fewer places for musicians to perform their art. The live musical entertainment business will be crippled for lack of places to play and money to be earned.

The over 200 NLRB cases ruled on in the last 30 years, prove that there is no doubt that musicians are independent contractors. Musicians:

wish to be their own bosses,
constantly rehearse their own music style,
spend between $5,000. to $150,000 for their own equipment,
wear their own choice of uniforms or costumes,
want their own managers to negotiate their contracts,
determine what songs will be performed and when.

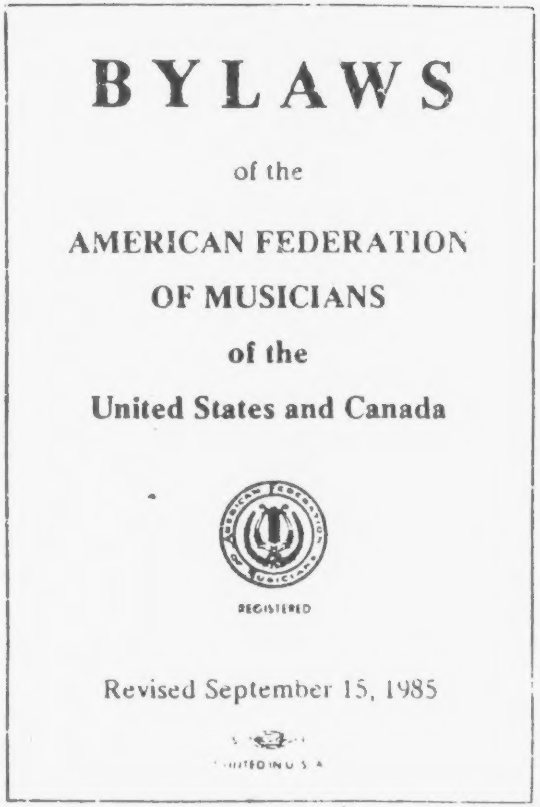
In conclusion let me say, musicians do not wish to be nor should they be employees, and passing S.1346 or H.R.1638 would only produce mandatory unionism, a result that strikes at the heart of democracy and the freedom of choice. For the sake of the entire music industry please say no to these bills.

Please do not allow to be tossed into the shredder, the livelihood and rights of hundreds of thousands of musicians and over two hundred rulings of NLRB cases.

If the AFM wants a bigger piece of the pie, let them do it the old fashion way, "**Earn it.**"

Respectfully Submitted

Thom Sweet
NAOL, MATA, PLEO,



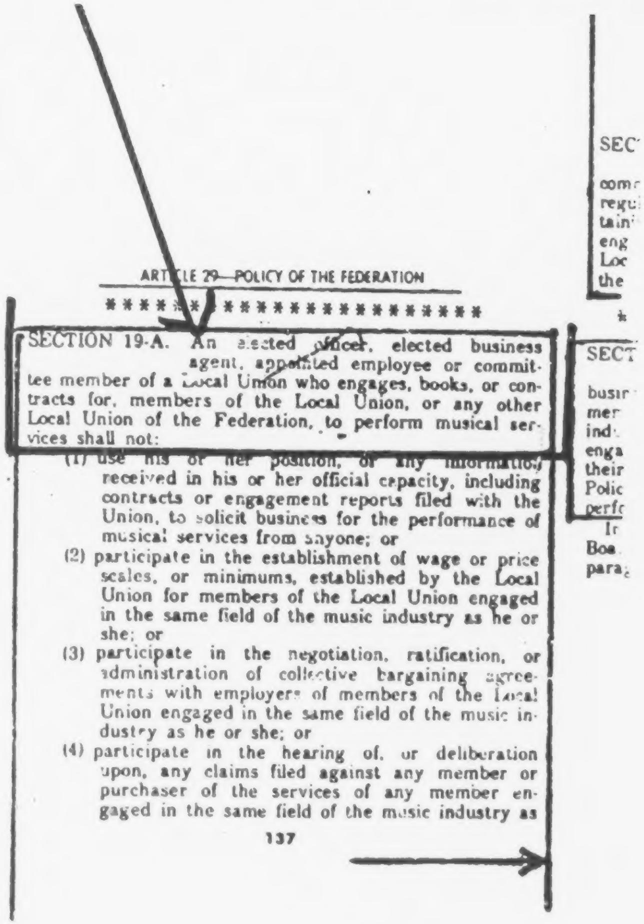
BYLAWS

of the

AMERICAN FEDERATION
OF MUSICIANS
of the
United States and Canada

REGISTERED

Revised September 15, 1985



ARTICLE 29—POLICY OF THE FEDERATION

* *

SECTION 19-A. An elected officer, elected business agent, appointed employee or committee member of a Local Union who engages, books, or contracts for, members of the Local Union, or any other Local Union of the Federation, to perform musical services shall not:

(1) use his or her position, or any information received in his or her official capacity, including contracts or engagement reports filed with the Union, to solicit business for the performance of musical services from anyone; or

(2) participate in the establishment of wage or price scales, or minimums, established by the Local Union for members of the Local Union engaged in the same field of the music industry as he or she; or

(3) participate in the negotiation, ratification, or administration of collective bargaining agreements with employers of members of the Local Union engaged in the same field of the music industry as he or she; or

(4) participate in the hearing of, or deliberation upon, any claims filed against any member or purchaser of the services of any member engaged in the same field of the music industry as

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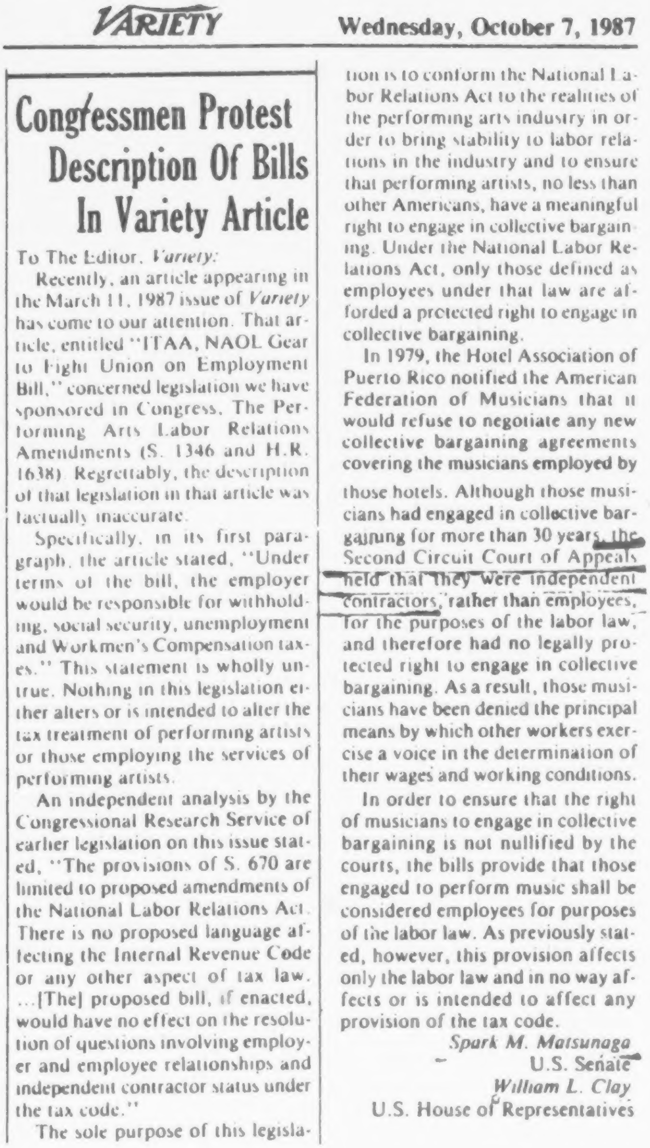

VARIETY Wednesday, October 7, 1987

Congressmen Protest Description Of Bills In Variety Article

To The Editor, *Variety:*

Recently, an article appearing in the March 11, 1987 issue of *Variety* has come to our attention. That article, entitled "ITAA, NAOL Gear to Fight Union on Employment Bill," concerned legislation we have sponsored in Congress, The Performing Arts Labor Relations Amendments (S. 1346 and H.R. 1638). Regrettably, the description of that legislation in that article was factually inaccurate.

Specifically, in its first paragraph, the article stated, "Under terms of the bill, the employer would be responsible for withholding, social security, unemployment and Workmen's Compensation taxes." This statement is wholly untrue. Nothing in this legislation either alters or is intended to alter the tax treatment of performing artists or those employing the services of performing artists.

An independent analysis by the Congressional Research Service of earlier legislation on this issue stated, "The provisions of S. 670 are limited to proposed amendments of the National Labor Relations Act. There is no proposed language affecting the Internal Revenue Code or any other aspect of tax law. ...[The] proposed bill, if enacted, would have no effect on the resolution of questions involving employer and employee relationships and independent contractor status under the tax code."

The sole purpose of this legislation is to conform the National Labor Relations Act to the realities of the performing arts industry in order to bring stability to labor relations in the industry and to ensure that performing artists, no less than other Americans, have a meaningful right to engage in collective bargaining. Under the National Labor Relations Act, only those defined as employees under that law are afforded a protected right to engage in collective bargaining.

In 1979, the Hotel Association of Puerto Rico notified the American Federation of Musicians that it would refuse to negotiate any new collective bargaining agreements covering the musicians employed by those hotels. Although those musicians had engaged in collective bargaining for more than 30 years, the Second Circuit Court of Appeals held that they were independent contractors, rather than employees, for the purposes of the labor law, and therefore had no legally protected right to engage in collective bargaining. As a result, those musicians have been denied the principal means by which other workers exercise a voice in the determination of their wages and working conditions.

In order to ensure that the right of musicians to engage in collective bargaining is not nullified by the courts, the bills provide that those engaged to perform music shall be considered employees for purposes of the labor law. As previously stated, however, this provision affects only the labor law and in no way affects or is intended to affect any provision of the tax code.

Spark M. Matsunaga
U.S. Senate
William L. Clay
U.S. House of Representatives

THE COURT HELD THAT ONLY

THE LEADER WAS AN INDEPENDENT

CONTRACTOR. NOT THE SIDEMEN.

SEE ITS DECISION.

NA OL

news release

FOR RELEASE: IMMEDIATELY

THE MUSICIANS' UNION IS PRESSING FOR CHANGES IN U.S. LABOR LAWS

FAVORABLE TO THE UNION

Strong pro-union lobbying forces are at work in Congress to radically change the entertainment industry and place it in the hands of union bosses. Persuaded by the American Federation of Musicians (AFM), Senator Matsunaga and Representative William Clay, D-Mo. have introduced two union-backed Bills.

S.1346 and HR.1638 addresses Sect. (8e) of Taft-Hartley Act, which would legalize Secondary Boycotts in the entertainment industry and would validate Agreements entered into by AFM Locals and purchasers of music, requiring that ALL music be furnished by AFM (union) members. If any band or individual musician was not an AFM member, union bartenders, waiters, delivery drivers and others could strike, picket, walk-out, and slowdown, all of which is now prohibited by U.S. law.

S.1346 and HR.1638 will classify any purchaser of music as the employer of the musicians supplying it. As such, musicians would no longer be considered independent contractors. Purchasers of live music will be "employers", and thereby liable for musicians hired in terms of Workmen's Compensation, Unemployment Insurance, Social Security, State and Federal Withholdings and Union Pension and Health payments.

The effects of this legislation on purchasers of music will be devastating! The bookkeeping and reporting alone will be bad enough with such added expense. This proposed legislation would work hardships on purchasers of music (Hotels, Lounges, Inns, Restaurants and others) who need changing attractions without the multiplicity of employee records.

Voluntary union mmebership is not succeeding so the Musicians' Union is attempting, through this legislation, to force union membership. If musicians wish to belong to the Musicians' Union there membership should be voluntary on the basis of services offered.

These Bills should be opposed by all purchasers of musical groups, musicians and booking agents.

FOR FURTHER INFORMATION CONTACT

CHARLES PETERSON, Treasurer
34 Metropolitan Oval
Bronx, N.Y. 10462
(212) 863-8997

National Association of Orchestra Leaders 34 metropolitan oval • new york, n. y. 10462 (212) 863-8997

National Association of Orchestra Leaders

14 Metropolitan Oval, New York, N.Y. 10462 • (212) 863-8997

SPECIAL

RE: SENATE BILL S.1346

INTRODUCTION.

In summary, the amendments sought by the union are:

1. To change the definition of who is an "employee." The law currently excludes from the definition of "employee" anyone who is an independent contractor. The union wants to change this. The union wants the law to say that anyone who performs musical services will be considered an employee and not an independent contractor.

2. To change the definition of who is an "employer." The union wants to include as an "employer" anyone who is, directly or indirectly, the purchaser of musical performances.

3. To change a section of the law that currently pertains only to the construction industry. By this change, the union wants to be able to demand pre-hire agreements from purchasers of musical performances. Remember, these purchasers would become the employers of the musicians if the union gets what it wants. By this change, the union wants to be able to require the purchaser ("employer") to agree to the terms of a labor agreement for musicians before any musicians are engaged. The union also wants to be able to have this pre-hire agreement contain a provision that would require the musicians to join the union after the seventh day of the engagement.

4. To change the law by allowing the union and the purchaser to enter into labor agreements that would require the purchasers to refuse to do business with non-union agents.

5. Finally, if the union's changes are adopted, it would no longer be an unfair labor practice for the union to force or require self-employed, non-union musicians to join the union.

IMPACT OF THE UNION'S PROPOSED AMENDMENTS.

1. The union concedes it wants to create a "legal fiction" by characterizing traveling musicians as "employees" of the purchaser of the engagement. The purchaser would then have the obligation to engage in collective bargaining with the union on behalf of the traveling musicians performing at the purchaser's establishment. The union would be able to exert economic pressure by picketing the purchaser if the union does not get the agreement it wants.

Under existing law, the union cannot threaten or coerce a self-employed musician to join. For example, the Union cannot picket or "blackball" the self-employed musician to force the musician to join the union. The changes proposed would allow the union to pressure self-employed musicians to join. That's not all. The Union could also picket the purchaser if the purchaser does not agree to the labor agreement the union wants. The impact of such picketing could cause the purchaser significant harm. For example, if the purchaser's real employees (its waiters, waitresses, bartenders, maintenance employees, housekeepers, and culinary workers) are members of other unions, the chances are that these people would honor an AFM picket line or face possible discipline from their unions.

2. If the AFM is successful, it would have the right to go to a purchaser before the purchaser has engaged musicians and demand that the purchaser sign a labor agreement dictating the terms and conditions of the musicians' engagement. This pre-hire agreement would not give the musicians a choice. They would have to be represented by the union. In addition, except in right to work states, the musician would have to join the union after the seventh day of the engagement. Being in a right to work state would only protect the musician from having to become a member. The musician would still have to be represented exclusively by the union and would be covered by the terms of the pre-hire agreement. If the purchaser does not want to sign the pre-hire agreement sought by the union, the union could picket the purchaser.

3. If the AFM's proposal goes through, the union will have the right to demand, during negotiations with the purchaser, a provision in the labor agreement that will require the purchaser not to do business with non-union leaders, contractors, recording artists, booking agents, talent agencies, promoters, or producers. This change in the law would return, to what the union's president calls "the good old days." In other words, if the purchaser refuses to agree and wants to use non-union providers, the AFM would be able to picket the purchaser.

4. Currently, self-employed persons (independent contractors) in all industries are protected from union pressure to join. There is nothing in the law that prohibits independent contractors from joining or maintaining their membership in a union. Up to now the law has provided freedom of choice for self-employed individuals. The AFM wants to change this. The AFM wants to create an exception to the law that basically says: if you are self-employed in the live musical performance industry, the union can require you to be represented by the union. Self-employed musicians could be required to comply with the internal by-laws of the union or face possible disciplinary action.

5. The Possible Tax Consequences. Although the union claims it is not seeking to change the tax code or IRS regulations, it seems to me that there are serious potential tax consequences. If, under U.S. labor laws, the purchaser of the musical performance is the employer, in my judgment there is the possibility that the purchaser would not want to run the risk of penalties the IRS could impose should the purchaser fail to deduct appropriate withholdings from monies owed its employees. It is possible that the purchaser will not want to take the risk of the IRS going along with the new labor law. The purchaser may take it upon itself to deduct the appropriate withholdings rather than face possible inquiries from the IRS. In addition, the union has acknowledged that withholdings is an issue the union may want to negotiate with the purchaser as a provision in the pre-hire agreement.

Chas Peterson

CHARLES PETERSON, Treasurer

cp/ac

National Association of Orchestra Leaders

34 Metropolitan Oval, New York, N.Y. 10462 • (212) 863-8997

SPECIAL

The AFM is on record as conceding that the amendments it seeks to the National Labor Relations Act are based upon "a legal fiction." First, the union seeks to do away with the right of musicians to be self-employed in any capacity (i.e., soloists, joint ventures, cooperatives, partnerships, corporations). The impact of the union's proposed amendment on self-employed musicians is that, regardless of the entrepreneurial risks the self-employed musician may have taken, the musicians would be considered employees of the purchaser of the engagement. This amendment would require self-employed musicians to accept the terms of employment dictated by the union. In non-right to work states such as Missouri, the terms would include the obligation to pay dues to the union.

The union's proposal runs afoul of one of the basic elements of our Country's federal labor policy - freedom of choice. Nowhere in the Act, as it now exists, is there language prohibiting self-employed persons from affiliating with a union if they wish. On the contrary, the only relevant prohibition is found in Section 8(b)(4)(A) which prohibits a union from engaging in improper conduct to force or require a self-employed person to join. The amendments sought by the union would make it lawful for the AFM to engage in what is now unlawful activity.

Second, the union's amendments would make the purchaser of the live musical performance the employer of the musicians, even though the musicians may in fact be in business for themselves (independent contractors). The amendments would allow the union to engage in picketing of the purchaser's establishment if the purchaser does not agree to the union's contract demands. The union would thus be able to engage in what has been recognized since 1947 as unlawful secondary boycott activity. By characterizing the purchaser as the primary employer, the union can achieve a strangle-hold on the live music industry. The union's president is on record as saying that the reason the union seeks these amendments is to return to what he refers to as "the good old days." Those of us who remember Petrillo and the union's tactics of the 1940s and 50s may wonder how "good" the old days were and whether the Congress of the United States wants to undo nearly 30 years of relative labor stability.

Third, the union wants to have the right to enter into pre-hire agreements similar to those permitted in the construction industry by Section 8(f) of the Act. However, the union does not provide the services of a hiring hall, has never developed an apprenticeship program and is obviously not comparable to construction trades unions. The AFM wants the power to force a purchaser of musicial entertainment to engage in contract negotiations before any musicians are employed. Again, this proposal strikes at the heart of federal labor policy - freedom of choice. The union wants to avoid having to convince musicians of the value of its representation. Why is the AFM afraid of the democratic processes upon which our federal labor policy is based?

Fourth, the union wants to carve out another exception to the "hot cargo" provision of the Act (Section 8(e)). The union wants to force purchasers to agree that they will not do business with non-union agents, promoters, producers or managers. You can understand the concern the majority of the industry has if this legislation is passed.

Finally, in my opinion, there are significant constitutional questions raised by the bill's apparent infringement on self-employed musicians' freedom of association. How can musicians who are willing to take the entrepreneurial risk of developing their own business be required to assume the status of "employee"? What possible public policy would be served by passing this bill? The only policy I see being served is the union's desire to increase its membership without the risk and expense of organizing as well as to gain control over the live music industry.

Chas. Peterson

TREASURER, N.A.O.L.

MINNESOTA BLUEGRASS
OLD-TIME MUSIC ASSN.
P.O. Box 9782 • Minneapolis, MN 55440

Monday, November 30, 1987

To Whom It May Concern :

My name is Arthur K. Blackburn, member in good standing of the Minnesota Bluegrass And Old-Time Music Association (MBOTMA). I am also Director of Advertising for MBOTMA, as well as Director of Non-Subscription Sales and Associate Editor for our monthly publication Inside Bluegrass magazine.

This letter is to inform you, on behalf of the 750 members of MBOTMA, of our unqualified opposition to HR 1638 and S 1346, or any legislation causing musicians to be catagorized as employees of any establishment or venue in which they perform.

We view any such legislation to be a direct threat to free enterprise, as well as the successful livelihood of virtually all area musical performers.

The Minnesota Bluegrass And Old-Time Music Association urges you to vote against HR 1638, S 1346, or any similar future legislation, and we hereby authorize Mr. Thomas Sweet to speak to you on our behalf concerning this issue.

Sincerely,

Arthur K. Blackburn

Dear Senator or Representative;

I am opposed to the Performing Arts Bills S. 1346 and H.R. 1638 or any bill that would attempt to make musicians employees for any purpose or give unions the automatic right to interfere in my direct bargaining with purchasers of music or entertainment.

My signature on this petition authorizes Charlie Peterson of the National Association of Orchestra Leaders, or Thom Sweet, President of the Minnesota Association of Theatrical Agencies, or their representative, to speak in my behalf.

NAME	ADDRESS	DATE
Mack Gruhot	5610 N. Innsbruck Ct. Fridley	11-23-87
Roger Anderson	1131 E. Hawthorne St Paul	11-23-87
[illegible]	1434 [illegible] St Paul	11/23/87
Michelle Burg	1495 Ross Ave. E. St. Paul	11/23/87
Dean Sweet	145 N. 16th St. Hopkins	11/23/87
William H [illegible]	3621 12th Ave S Mpls Mn	11/23/87
[illegible] Boyd	RR #3 Sparta IL 62286	11/23/87
Ricky Lynn	3509 Tourist 70117	11-23-87
Brian Kelly	2201 Stonegate Denton Tx 76205	11/23/87
[illegible]	1284 Ironwood Dr #7 Eagan 55123	11/23/87
Steve Erickson	3944 Pleasant Av. S.	11-24-87
David [illegible]	1327 MADISON ST NE, Mpls	11-24-87
[illegible]	8608 48th AVE. NO. NEW HOPE, MN	11-24-87
[illegible]	118 Sargent Ft Worth Tx	11 24 87
[illegible]		
Ed Fodor	802 Carroll ave St Paul Mn.	11 24 87
Eric [illegible]	39 VAN KIRK ST Republic Pa	11/24/87
MARK [illegible]	403 [illegible] Dr.	11/24/87
Doug D. [illegible]	10750 Rockford Rd #312 Plymouth	11/24/87
Dan Kinneys	12701 220th Hastings Mn	11-24-87
[illegible]	11781 Lock Ridge Ave Hastings	11-24-87
Freddy McNutt	PO BOX 207/Eden Prairie Mn 55431.	
Mae West	" " " " "	
[illegible]	1300 W. Medicine Lk Dr. Plymouth	11-24-87
Julie [illegible]	1131 E. Hawthorne St Paul	11-27-87

Dear Senator or Representative;

I am opposed to the Performing Arts Bills S. 1346 and H.R. 1638 or any bill that would attempt to make musicians **employees** for any purpose or give unions the automatic right to interfere in my direct bargaining with purchasers of music or entertainment.

My signature on this petition authorizes Charlie Peterson of the National Association of Orchestra Leaders, or Thom Sweet, President of the Minnesota Association of Theatrical Agencies, or their representative, to speak in my behalf.

NAME	ADDRESS	DATE
Wm. C. [illegible]	5138 [illegible] N. Mpls Mn 55430	10/16/87
[illegible]	7433 Humboldt Ave. So mpls 55423	10-19-87
[illegible]	9933 Darnel Rd Eden Pr. MN 55344	10/18/87
[illegible]	18701 Stratford Rd #346 Minnetonka Mn 55345	10/19/87
James Calhoun	836 3rd Ave #208 Excelsior Mn 55331	10/19/87
Brian L. Kraft	18701 Stratford Rd #215 Mtka, Mn	10/16/87
[illegible]	3031 E [illegible] S. Apt 510 Mpls Mn	10/19/87
[illegible] Krause	6510 Cty. Rd. #110, W. Mound, MN.	10/19/87
Tom [illegible]	5001 Harriet Ave So Mpls, MN 55419	10/19/87
[illegible]	8545 Fremont Ave S. Mpls, MN 55420	10/19/87
Dick Schoemer	17553 Pond Ct. Eden Prairie, MN 55346	10/19/87
Pam Bradford	18413 Harris Rd Mtka MN 55345	10/20/87
Johnny [illegible]	2225 Snowshoe [illegible]	10/20/87
[illegible]	3535 Harriet Ave S Mpls 55408	10/20/87
[illegible]	836 3rd Ave #208 Excelsior MN 55331	10/22/87
[illegible]	18701 Stratford Rd #307, Mtka, Mn	10/22/87
[illegible]	647 Ridgeview Dr. Wayzata, Mn	10/21/87
[illegible]	Randy Erwin 6855 W. 192nd Ave Eden Prairie, MN	10/21/87
Douglas B. Brown	20105 Cottagewood Ave, Excelsior MN 55331	10/22/87
Dale Stewart	2932 Bryant So. Mpls. 55408	10/22/87
[illegible]	6410 [illegible] Excelsior MN	10/26/87
[illegible]	3333 2nd Av S Mpls, MN 55408	10/23/87
[illegible] Samuelson	1115 Kirkwood Ln Ply Mn 55441	11/25/87
[illegible]	Box 15 - Excelsior, MN 55331	11/27/87

Dear Senator or Representative;

I am opposed to the Performing Arts Bills S. 1346 and H.R. 1638 or any bill that would attempt to make musicians **employees** for any purpose or give unions the automatic right to interfere in my direct bargaining with purchasers of music or entertainment.

My signature on this petition authorizes Charlie Peterson of the National Association of Orchestra Leaders, or Thom Sweet, President of the Minnesota Association of Theatrical Agencies, or their representative, to speak in my behalf.

NAME	ADDRESS	DATE
[illegible]	2010 Marshall Ave #4	11/23/87
Peter Brennan	2812 Westcliffe Dr. Burnsville	11/23/87
[illegible]	[illegible] St Paul	11/23/87
Brian Anthony Smith	6816 Upton Ave S. Richfield Mn	11/23/87
Daniel Brennan	1434 Grand Ave #3 St Paul Mn	11/23/87
Tom Neufeld	1111 N. Hamline Ave #7 St Paul, MN	11/23/87
Jeffrey Kelm	3812 23 Av. So., Mpls., MN.	11/23/87
Jeff [illegible]	332 Pond Ridge Cr. Wayz, MN	11/27/87
Steve [illegible]	2855 Rice St #1010 Roseville	11-27-87
KC Birette	9143 W Hwy 55 #303 [illegible] Mn	11.29.87
Ronald McGray	8457 Regent Av No #311 B Pk Mn.	11.29.87
David J Bloc	3333 Bloomington Ave, Mpls	11/29/87
Don Ohmeyer	1417 Yosemite Ave St Louis Pk	11/29/87

NAME	ADDRESS 55435	DATE
Mike [illegible]	5700 Brook DR Edina, Mn	12-2-87
[illegible]	604 Ottawa Ave Golden Valley Mn	12/2-87
Joan [illegible]	8509 Morgan Ln. Eden Prairie, MN	12-2-87
[illegible]	200 Elizabeth Ln Mpls [illegible]	12/2/87
Jimmy Allen	1548 ASHLAND AVE St. Paul	12/2/87

NAME	ADDRESS	DATE
Jay McGregor	1477 St. Paul Ave, St. Paul MN	11-23-87
Delphine J [illegible]	5308 Xenia Ave No Crystal	11-23-87
Frank [illegible]	137 14TH AVE. NE. MPLS MN.	12-6-87

EDWARD M. KENNEDY, CHAIRMAN

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THOMAS M. ROLLINS, STAFF DIRECTOR AND CHIEF COUNSEL
HAYDEN G. BRYAN, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, DC 20510-6300

December 2, 1987

Mr Thom Sweet
President
Minnesota Association of Theatrical Agencies
Box 28081
Crystal, Minnesota 55428

Dear Mr. Sweet:

This letter responds to your recent request to testify before the Senate Subcommittee on Labor at its December 10, 1987 hearing regarding S. 1346, the Performing Arts Labor Relations Amendments of 1987.

I appreciate your interest in this legislation. Unfortunately, due to time constraints at the hearing, I am unable to provide you with the opportunity to testify. The witnesses selected represent a balanced cross-section of the many qualified individuals who expressed interest in testifying.

I believe that the Minnesota Association of Theatrical Agencies can make an important contribution to the hearing record. Accordingly, I would welcome any written testimony you may wish to submit to the subcommittee. As chairman, I will see that the record is kept open for at least two weeks following the hearing. Written testimony may be submitted prior to that time, either by hand delivery to 608 Hart Senate Office Building, or by mail to 428 Dirksen Senate Office Building, Washington, D.C. 20510, attention Labor Subcommittee. If you have any further questions, feel free to contact Lois Fu of the committee office, (202) 224-3239.

Again, thank you for requesting the opportunity to testify at this hearing. I appreciate your interest in labor relations in the performing arts industry.

Sincerely yours,

Howard M. Metzenbaum

Howard M. Metzenbaum
Chairman, Subcommittee on
Labor

REC.
7 DEC. 87

MATA
MINNESOTA
ASSOCIATION OF
THEATRICAL
AGENCIES

P.O. Box 28081
Crystal, MN 55428

Dear Senator Metzenbaum and Members of Subcommitte on Labor;

I appreciate the opportunity to enter information into the record and address some of the questions that were not asked at the hearing, for lack of time.

I was amazed to see the proponents of S.1346 pretend naivete at a congressional hearing.
My question is, if the proponents of S.1346 do not know what the changes of 8(e) and 8(f) would have, why would they want such revisions in the bill?

I would like to enlighten all would be supporters and proponents to the effects of S.1346, in plain english, exactly what 8(e) and 8(f) would do, from back to front.

8(f). Pre-Hire Agreement:
A pre-hire agreement simply means; a union, by law, automaticaly has an agreement with the "employer" or purchaser, that the "employer"/purchaser **MUST** negotiate with the union as if there had been a vote of the "employees" to become unionized, with out a vote ever having been taken.
Simply stated, by law, the union automaticaly represents all "employees"/musicians to all "employers"/purchasers. Like it or not.

8(e). Hot Cargo and Secondary Boycotts:
Hot cargo and secondary boycotts simply are forms of picketing and/or informational bannering, allowed by 8(e), in cases where a pre-existing agreement with a union is not being lived up to by a "employer"/purchaser. It may include, but not limited to, asking other unions to, cease doing business, slow down business or supportive striking, of a "employer"/purchaser. It may include, but not limited to, the union picketing and/or informational bannering, or striking a "employer"/purchaser.

It now becomes obvious, why, the union must take away the musicians "Independent Contractor" status and make them "employees", and make the purchasers of live musical entertainment, "employers". The union must accomplish this to be able to use sections 8(e) and 8(f), of the Taft-Hartley Act, to harass others into doing business their way.

MINNESOTA ASSOCIATION OF THEATRICAL AGENCIES
P.O. Box 28081
Crystal, MN 55428

Forced Unionism Scenario:

Step 1. A union representative goes to a Holiday Inn's Entertainment Purchaser.

The representative tells the purchaser that the hotel must pay a minimum of $XXX.XX to each musician per night, and $XXX.XX to the leader per night. In addition the hotel must hire a minimum number of musicians per night, according to the size of the room were entertainment is to be held. In addition the hotel must make a certain amount of deposits into union controlled bennifits.

Step 2. The hotels purchaser tells the union representative to "Buzz off Buster".

Step 3. The union pickets the Holiday Inn and asks other unions to honor their picket line and not cross it or slow down work. The unionized truckers may not deliver to the Holiday Inn. The unionized Bartenders, linen services, busboys, ect., may slow down work or not cross picket lines. Customers may not want to cross a picket line for fear of harasment or bodily injury.

Step 4. Slow or no business for the Holiday Inn.

Sounds like mandatory unionism to me!

The way the law reads now this is illegal. If S.1346 passes, it would be legal.

Bottom Line:

If you do not think the union would do such a thing, or you believe the union when they say they can not, I have enclosed one example of many, were the A.F. of M. did picket a non-union club and a non-union band, for just such a purpose. (See exhibit A)
This was done while the law did not permit such activities. Do you think the union will not follow through in this manner if the law does permit these actions? The union will, and you can take that to the bank, by virtue of the over 200 cases settled by the National Labor Relations Board.

Add to this, that no musician, (union or non-union), I have talked to wants to give up their "Independent Contractor" status. I, by myself, work with thousands of musicians every year.

Tax Implications:

While S.1346 it's self does not directly effect taxes or tax statuses, it is pretty obvious what the ramifications will be.

Passing this bill is like building a new road. When building a road, you allow openings for driveways. There may not be structures presently at these driveways, and the New Road does not controll the type structures to be built.

I submit one the first structures to be built on one of these driveways on the S.1346 Road, will be the IRS Tax Dept., seizing this opportunity to make their tax collecting process easier, through this convenient new road. (See Exhibit B)

Tax Scenario: (Short & Sweet)

All the club owners I work with have told me "If S.1346 becomes law, I will discontinue live entertainment rather than put up with the headaches and costs of bookkeeping for all these musicians."

I will be out of a job and so will thousands of voting musicians I work with that are playing full time, unlike the majority of part time musicians the AFM represents. **HOW?**

Passing S.1346 **would create** the following chain of events:

1. Independent contractors would become employees for tax purposes, via this new road.
2. Purchasers of live musical entertainment would be required to with-hold taxes, liability insurance, workmens comp., social security, and other work related bennifits.
3. Purchasers of live musical entertainment would then take a good look at;
    - A) whether or not the art form is worth the extra encumbrance of hiring some one to handle the deluge of paper work that would occur for a venue that debuts a new band every week,
    - B) whether it would be more cost effective to hire one house band,
    - C) whether it would be more cost effective and less headaches to put in a sound system.
4. Either scenario (B or C) means a lot fewer places for musicians to perform their art. The live musical entertainment business will be crippled for lack of places to perform the art and money to be earned.

Again I thank you for letting me enter testimony into the record concerning S.1346. I am adamantly against this bill as are the people and associations I have been authorized to speak in behalf.

The associations are;

The Minnesota Association of Theatrical Agencies,
The National Association of Orchestra Leaders,
The Minnesota Bluegrass and Old-Time Association,
The Professional Live Entertainers Organization,
The National Licensed Beverage Association,
And hundreds of individual voters, signed by petetions, who will be effected by this bill.

Thom Sweet
President of MATA

Questions from Senator Matsunaga
for Thom Sweet

1. You have suggested in your written statement that, rather than defining independent contractors as employees for labor law purposes, that we simply change the law to allow unions to represent independent contractors. Can you explain the differences between these two approaches? If your approach were adopted, would the National Association of Orchestra Leaders and the Minnesota Association of Theatrical Agencies support the provision?

[illegible] -4 [illegible] 2 24

MATA
MINNESOTA
ASSOCIATION OF
THEATRICAL
AGENCIES

P.O. Box 28081
Crystal, MN 55428

February 29, 1988

Dear Senator Matsunaga;

Thank you for the opportunity to answer your specific questions. For clarity I will invert the order of the questions.

I have polled the associations I represent and arrived at a consistant answer. No part of S. 1346 could be used in the suggestion presented; therefore to consider any alternatives involving S. 1346 would be an excersise in futility.

My suggestion was merely that, a suggestion. I am not a lobbyist or a leagle beagle. For me to define differences and approaches the union might take to help them out of their dilemma would take more time than I have to offer. I have a full time job that would be affected by the passage of S. 1346, that is my concern and the concern of the associations I represent.

I must say that I am completely flattered that a man of your significance and position would ask my input on a possible bill that could affect hundreds of thousands of people. It makes me very proud to be an American.

Sincerely.

Thom Sweet
President, MATA

Senator MATSUNAGA. We would be happy to hear from you now, Mr. Heaberlin.

Mr. HEABERLIN. Thank you very much, Mr. Chairman. I appreciate the opportunity to be here today.

I am a lifelong musician, also a practicing theatrical agent and a member of the Board of Directors of the International Theatrical Agencies Association, a group of small businessmen and women operating throughout the United States and Canada, who collectively represent for the most part the travelling entertainers who perform in the lounges, nightclubs, and hotels of this country.

It is the opinion of our organization, if I may say, that the remedies that are sought under this particular proposal are really not sought as protections under the law, but to add the factors of intimidation and coercion. We are here not to ask for any radical change in the law at all; we want to maintain the status quo with the system that has served this thriving industry very well for the past 40 years. We think that our business is alive and well.

I do not want to revert to my text, which I assume will be printed in the record, but rather, would like to address just a couple of specifics, if I may.

First, it is interesting to me that repeatedly, the reason for the bill existing is somewhat questionable. It seems as though the proponents of this bill are saying that it is proposed as a musicians' rights bill rather than the union rights bill, as we see it.

It is purported that the courts and the NLRB have necessitated this move because of their rulings of making all musicians labelled as independent contractors, when in fact that is not what they ruled at all.

The monumental ruling of the Second District Court of Appeals ruled that the band leaders were independent contractors.

There are two kinds of relationships in the bands playing the lounges, Senator. First you have a leader/sideman situation. For example, if I am the leader, and I would want to hire you to play a particular instrument, I would tell you the songs we are going to do, the outfits, the repertoire, what your part would be; I would negotiate with you for wages and so on. That is one type—the second being, ok course, a co-op group.

It is clearly our opinion, and in that situation where I take on the function of being your employer, that it should be defined that way by law. The co-op groups are for the most part the exception and not the rule.

I think the fact that the small business issue that Thom raised is certainly a substantial one. I am very proud of the fact that I created my job; I was not appointed to it. And I have provided work for hundreds of artists, union and non-union, and would like to continue doing so.

I would like to also add that it is the opinion of our organization and our counsel and those of the supporting organizations, which seem to be the vast majority of those involved in the entertainment industry in this country, that we do not feel there is anything in the current law that prohibits collective bargaining, from allowing anyone to join a union. That is certainly their privilege, and we respect that. We do not see the need for this type thing. People can join the union now, can collectively bargain.

Some other quick points, if I may.

The case could well be summarized, perhaps, as saying the tail is wagging the dog. It seems as though the union bosses, the union collective, wants this bill. Obviously, they are in financial difficulties by their own admission. We are all for their existence, and underscore that in legitimate employer/employee situations, specifically symphony orchestras, opera performers, and so on. Nobody questions that.

For the independent entrepreneur out there travelling, however, we feel that he should have the freedom to perform, and to perform without having to succumb to operating under the mandates of the union. We feel that that should be his freedom.

I think also it should be pointed out that there may be other ramifications of this bill. The groups of purchasers, the groups of musicians, the groups of agents that are opposing this—and it seems like everybody I have come across with the notable exception of the AFM is in opposition to this thing—it bewilders me that somehow this majority status cannot be determined. But I do feel that there may be some other implications in the bill. Title VII, for example, when we get into employer/employee relationships, could be a problem with the Immigration Reform and Control Act, civil rights, age discrimination, et cetera.

Also, of course, we haven't brought this up, but the tax issue. Surely, this bill doesn't say anything about taxes, but it doesn't say anything that precludes that, either, and I would submit that for consideration.

Thank you for your time. Let me add one thing, if I may. This could be a very intimidating circumstance, and I want to thank you personally for making me feel at home and comfortable here. Frankly, I was scared to death to come here, as one individual businessman representing a lot of small businesspeople.

The last time I came to Washington, I went back to West Virginia, Senator, and went to Edgewood Country Club in Charleston and came out, and my new car had the windshield smashed, the lights knocked out, the side windows spray-painted, and generally beat all to hell. Two days later I received a call saying, "The next time you go to Washington to speak against our union, what happened to your car will happen to you." Well, I found that to be somewhat intimidating; and I find this situation to be very open, and I appreciate the fact that you are willing to consider all of this information and certainly respect the position you are in.

Thank you.

Senator MATSUNAGA. Thank you very much, Mr. Heaberlin.

[The prepared statement of Mr. Heaberlin, responses to questions submitted by Senator Matsunaga, and additional material submitted for inclusion in the record follow:]

WRITTEN TESTIMONY
OF
WILLIAM A. HEABERLIN
FOR THE
INTERNATIONAL THEATRICAL AGENCIES ASSOCIATION

HEARINGS BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
S. 1346

DECEMBER 10, 1987

My name is William Heaberlin. I am Chairman of the Legislative Affairs Committee of the International Theatrical Agencies Association, an organization comprised of professional theatrical agents with 136 offices across the U.S. and representing more than 100,000 entertainers. I am a past President of the ITAA and I continue to serve on the Association's Board of Directors. I am also the owner of Media Promotion Enterprises, a full-service theatrical agency serving 26 states. With me today is John Tysse, ITAA's legislative counsel.

I appear today in strong opposition to S. 1346. In short, the bill is blatant special interest legislation that seeks to drastically change the well established legal precedent that performing artists are independent contractors with devastating implications for the overwhelming majority of working musicians, purchasers of music, and artist representatives.

In one form or other, the contents of this bill have been presented repeatedly. After being carefully scrutinized, each version has been accurately analyzed as ill-advised and self-serving legislation with direct benefit only to its principal proponent -- the hierarchy of the American Federation of Musicians (AFM).

The cosmetically altered current version of the bill, like its predecessors, maintains the principal assaults on the freedom of choice for thousands of individuals by amending the National Labor Relations Act to grant unprecedented coercive powers to entertainment industry unions.

First, S. 1346 seeks to amend Section 8(e) of the NLRA by legalizing "hot cargo" agreements. The AFM, for example, would be able to insist that purchasers of music negotiate terms in a labor agreement that would forbid the purchaser to do business with practically anyone the Union does not want the purchaser to do business with. Currently, the only industries exempted from this prohibition are the construction and garment industries for reasons that have no bearing on the entertainment industry, and even in these cases the "hot cargo" exemption remains extremely controversial.

Second, and also impacted by the proposed amendment to Section 8(e), is the unfair labor practice defined in Section 8(b)(4)(A) of the NLRA, the prohibition on secondary boycotts and other unfair intimidation tactics by a union. Since 1947, this section has made it unlawful for a union to force or require "any employer or self-employed person to enter into any agreement which is prohibited by Section 8(e)". If the AFM is granted the exemption from 8(e) it wants, the AFM could put economic pressure on a purchaser if the purchaser did not agree to the type of "hot cargo" provision the union desires.

Third, S. 1346 seeks to amend Section 8(f), a 1959 provision that has applied, up to now, only to the construction industry. Section 8(f), among other things, allows pre-hire agreements in the construction industry. In every other industry, pre-hire agreements are illegal.

Pre-hire agreements would allow the AFM to insist that purchasers enter into labor agreements with the Union before musicians are hired. This concept is antithetical to the Union's assertion that it is attempting to protect the freedom of choice of professional musicians. That assertion is simply not true. The pre-hire agreement precludes freedom of choice and would require professional musicians to comply with the terms of a labor agreement that have been set before the musician ever arrives on the scene.

Historically, these agreements were deemed appropriate for the construction industry because construction sites were staffed primarily by union hiring halls through which journeymen were referred for employment. In the past, on a typical construction site, the construction industry employer did not care who the particular journeymen were because, theoretically, one journeymen's skills were the same as any other. Obviously, the rationale behind the pre-hire agreement in the construction industry has no bearing on the entertainment industry. It is incredulous to think that individuals who make their living based upon their unique artistic talent, should be analogized to construction workers who, because of their journeymen status, are considered indistinguishable from one another in terms of the skills they bring to the job.

When you put the proposed amendments to Section 8(f) and Section 8(e) together, the practical result is that the Union would have a monopoly and exclusive right of referral of live entertainment throughout the country without regard to the desire of the self-employed professional musicians or the purchasers of musical entertainment.

Fourth, S. 1346 seeks to redefine the term "employer" as "any person...directly or indirectly...who is the purchaser of musical performance services regardless of whether the performer of such services is an independent contractor, employer or employee of another employer". The buyer of the services of the self-employed professional musician would be considered the employer of these musicians, even though legal precedent has clearly established that the musician in this case is an independent contractor.

S. 1346 also seeks to redefine the term "employee". The bill continues to press for a definition its proponents concede is a legal fiction by excluding from the definition of independent contractor "any individual having (independent contractor status) who is engaged to perform musical services...".

The ITAA and the thousands of musicians we proudly represent know by first-hand experience the impact S. 1346 will have on live musical entertainment if the bill becomes law. In this regard, we believe the following additional factors are worthy of consideration.

First, and perhaps most important, consideration should be given to the fact that the proponents of this measure refer to it as a "Musicians Rights" bill. It is interesting to note, however, that many of the thousands of independent musicians in this country who are full-time playing professionals have contacted their elected representatives stating that they want no part of this measure. The hundreds of thousands of professional full-time musicians represented by the ITAA, NAOL, American Musicians Union, Allied Musicians Union, and numerous independents are all on record as opposing the bill. If this is truly a musicians rights bill, then why don't the musicians want it?

Second, according to the AFM's own testimony in a hearing before the 99th Congress, only 13% of the Union's membership is made up of playing professionals. The other 87% is primarily part-time musicians who play weekend jobs, one-night stands, and so on. Most of this 13% professional musician membership in the AFM includes legitimate employees of symphony orchestras, fixed shows, or recording studios. Obviously, the Union does not represent the thousands of full-time traveling lounge performers who would be most adversely effected by S. 1346. In fact, the Union's own publications continually underscore the need to get the lounge musicians paying into the depleted Union coffers -- by whatever means. S. 1346 would certainly do the job.

Third, consideration should be given to precisely who the real employer of musicians should be. According to the industrywide ITAA contract, the bandleader "shall at all times have complete supervision, direction, and control over the services of his personnel on this engagement and expressly reserves the right to control the manner, means, and details of the performance of services to fulfill the entertainment requirements". Hence, if you are a sideman musician looking for work, you may wish to approach an established bandleader who would negotiate with you as to the money you would be paid, the hours you would work, the songs you are to play, the musical parts you are to perform, the songs or harmonies you are to sing, what you are to wear, what time you will rehearse, etc. In the strictest sense, it is the bandleader, then, who, in such cases, is the true employer. Yet by a legal fiction S. 1346 would make the purchaser, say the lounge or the hotel, the employer.

Fourth, some consideration should be given to the fact that S. 1346 may well impact other areas of the law. For example, if all musicians must become "employees" and all purchasers of music become "employers", would these entities also be covered by other Federal employment laws such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the recently passed Immigration Reform and Control Act? The answer is probably yes.

Fifth, musicians, agents, and purchasers of music are fully protected by the current labor laws. As it stands, musicians are free to join or not join a union. The proponent's argument that the AFM cannot engage in collective bargaining is clearly a guise. Make no mistake about it -- the union currently can and repeatedly does bargain collectively. This bill, however, seeks sweeping wholesale changes that would, in effect, turn the industry upside down and give the AFM unprecedented controls over thousands of individuals who clearly do not want to relinquish their freedoms to operate as self-employed entrepreneurs.

A sixth significant consideration is the impact of the bill on employment of musicians. Holiday Inns, among others, has gone on record as planning to install video discos (recorded music) in their lounges, replacing live entertainment if and when this bill ever passes. Potentially, this bill, which ironically is supported by a musicians union, could feasibly put thousands of musicians out of work.

When this issue was discussed with AFM officials in Dallas, one official remarked that while it was true that many musicians could possibly be put out of work, at least those who were working would be paying into the Union's coffers. Hence, from the AFM's standpoint, it is clearly a situation where the union has nothing to lose.

Seventh, consideration should be given to the possible tax consequences of passage of this bill. While the bill addresses labor law only, AFM officials have stated themselves that "The IRS makes its determination with the help of God alone." Currently the self-employed independent contractors performing music in the lounges, hotels, and clubs of this great nation are responsible for their own tax filings. Is the IRS going to ignore this opportunity to establish a primary party for reporting of taxes? Since there is nothing in the bill which precludes the IRS from adopting the new definition of employer and employee which S. 1346 creates, then the tax implications of the bill to both musicians and their purchasers cannot be ignored.

A final concern involves the AFM itself. In his speech to the International Conference of Symphony and Opera Musicians (ICSOM) in Salt Lake City, Victor Fuentealba, then president of the AFM mentioned that his organization "could really only qualify as a labor union in-so-far as symphony, opera, ballet, and recording musicians were concerned". This Union has no hiring hall practices such as those which are prevalant in the unionized construction industry. Essentially, the AFM is made up of 87% part-time musicians who moonlight on occasional engagements. As Sam Denov, former Chair of ICSOM stated, "This is probably the most volatile and misunderstood political and legal issue facing the AFM. There is no tradition in this Union of employee-members running the Union. The bandleaders (employers) have always done it, and while some sidemen know it isn't right, the system is so institutionalized that most have come to accept it. Politically, it will be very difficult to change."

Interestingly, ICSOM joined four other organizations in attempting to form a consortium of "employed AFM members to better serve their individual and collective needs". Hence, the true employee-professionals in the AFM no longer wish to carry the ball for the scores of local musicians who must pay union dues in their specific locals.

The far-reaching impact of the bill conclusively indicates that the proponents of the bill neither appreciate -- nor even understand -- how the live entertainment industry really functions. The wishes of the self-serving few must not be allowed to obliterate the livelihoods of those talented individuals who operate freely in our free enterprise system.

Clearly, S. 1346 is ill-advised and unnecessary legislation. My testimony and the attached analysis of S. 1346 should underscore the real impact and hidden reasons behind the bill.

Included among those organizations who have expressed opposition to similar legislation in the past are the U.S. Chamber of Commerce, the American Hotel Motel Association, the National Restaurant Association, the American Council on Education, Holiday Inns, NAOL, National Association of Campus activities, American Musicians Union, Allied Musician Union, Atlantic City Casino Association, AMFAC Hotels, Nashville Association of Talent Directors, and Hilton Hotels International, not to mention thousands of individual musicians who want no part of this measure.

Collectively, we all see S. 1346 for what it is -- a bill designed to bail out a financially troubled union at the expense of the performers, purchasers, and purveyors of live entertainment in the USA. We urge you to reject the proposal and permit the entertainment industry to operate under the laws that have served us well for several decades.

Thank you for this opportunity to testify. I will be happy to try and answer any questions you may have.

ANALYSIS OF

THE PERFORMING ARTS LABOR RELATIONS AMENDMENTS, S. 1346

The Senate soon may be asked to consider S. 1346, the "Performing Arts Labor Relations Amendments." The bill has been touted by its supporters, especially the American Federation of Musicians (AFM), as a matter of fairness for individuals in the entertainment industry who allegedly have been denied the protections of the National Labor Relations Act (NLRA). In fact, as the following analysis makes clear, the bill actually would take away from thousands of musicians the freedom they currently enjoy to determine the terms under which they will work. In addition, S. 1346 would grant broad new coercive powers to entertainment industry labor unions.

The International Theatrical Agencies Association (ITAA) is an organization comprised of professional booking agents serving the United States and Canada. With 136 offices located across the country, ITAA members represent more than 100,000 skilled entertainers who perform primarily in hotels, nightclubs, and restaurants on a full-time basis. The vast majority of these professional musicians are independent contractors, a status which they prefer to keep. Unlike local musicians who perform mostly single night engagements as a sideline or hobby, the performers represented by the ITAA are in effect small businesspersons who are engaged exclusively in live musical entertainment to earn their livelihoods.

Proposed Changes in Existing Law

S. 1346 would amend four primary areas of existing federal labor law as embodied in the NLRA: 1) the status of independent contractors and employer/employee relationships; 2) "hot cargo" agreements; 3) "secondary boycotts" and "secondary picketing;" and, 4) union security prehire agreements.

Independent Contractors. The NLRA currently excludes from the definition of "employee" anyone who is classified as an independent contractor. The distinction between an independent contractor and an employee is determined by a "right-of-control" test: if the person paying for services can control the means to be used in reaching the desired result, an employer-employee relationship normally exists. In an important legal decision, the United States Court of Appeals for the Second Circuit applied this test in Hilton International Co. v. NLRB, 690 F.2d 318, 321 (2d Cir. 1982), and concluded that musicians who performed in hotel lounges on an ongoing basis were independent contractors because the hotels did not "exert any significant authority over the manner in which either the band leaders or the musicians perform." Many other NLRB and court decisions have since followed this precedent by ruling that lounge and nightclub musicians are independent contractors rather than employees.

Despite (or perhaps because of) this well-established rule, S. 1346 creates a "legal fiction" by requiring that musicians operating as independent contractors be treated as employees for labor law purposes. A corresponding change would require that any person who purchases live musical entertainment be considered the employer of the performers. The AFM readily admits that these changes would create the "legal fiction" of an employer-employee relationship where one does not presently legally exist.

It is important to stress again that the vast majority of the individual musicians who would be affected by this legal fiction prefer to operate as independent contractors. In other words, they do not want the so-called remedy that S. 1346 provides.

Hot Cargo Agreements. Under current NLRA law, unions and employers generally are prohibited from entering into "hot cargo" agreements. A hot cargo agreement is a formal deal with a union under which an employer agrees to cease doing business with persons who are non-union. Limited exceptions to the ban on hot cargo agreements are permitted in the garment and construction industries, in the first case arguably because such agreements will minimize the proliferation of jobber-controlled "sweatshops", and in the latter case because of a perceived potential for violence if union and non-union construction workers are permitted to work side-by-side on the same worksite. It should be noted that these exceptions are nevertheless controversial because they deny individuals freedom of choice by prohibiting them from getting a job unless they join a union.

S. 1346 would extend a "hot cargo" exemption to the live music industry, on the alleged rationale that musical entertainers are like garment and construction workers, even though garment and construction workers are clearly employees and not independent contractors. In effect, if S. 1346 is enacted, purchasers of live musical entertainment will be forced by hot cargo agreements only to do business with union musicians, agents, promoters, and managers.

How will the union ensure that it can get the purchaser to sign a hot cargo agreement? Very simply, because of the substantial economic coercion it can exert against any purchaser under the provisions of S. 1346 described in the next section.

Secondary Boycotts and Secondary Picketing. Under existing NLRA law, it is illegal for a union to engage in "secondary" activity, such as picketing, strikes, and other intimidation tactics, to enforce its demands. The purpose of the restriction is to insulate neutral third parties from labor disputes in which they have no direct involvement.

S. 1346 would give musicians' unions a broad exemption from this restriction on secondary strikes and boycotts. Purchasers of live musical entertainment would likely be forced by the threat of such picketing to hire only unionized musicians rather than risk the disruptions that picketing would cause. For example, a union which did not like the fact that a hotel contracted with a non-union band could picket the entire premises, potentially disrupting deliveries and other normal operations, even though none of the hotel's own employees belonged to the union.

S. 1346 would also permit a union to legally "blacklist" any self-employed musician who refused to join the union. Musicians who freely choose to operate as self-employed small business persons are currently protected under the NLRA from union pressure to join. In other words, a union could not advise a hotel for example not to contract with a musician or musical group which did not belong to the union. S. 1346 removes this protection from intimidation by allowing the union to use the "blacklist" to force these individuals into union membership, and thereby union control, if they want to work.

Prehire Agreements. Section 8(f) of the NLRA permits employers and unions only in the construction industry to enter into agreements recognizing the union and setting the terms and conditions of the employment before any employees are hired. Known as "pre-hire agreements," these accords are binding and enforceable in court as long as they are in effect. Congress permitted this special favorable treatment to construction unions because hiring is frequently done through a union "hiring hall", which in some cases facilitates the assignment of workers to a specific project. Section 8(f) is a narrow, limited exception to the rule that employers may bargain only with unions that have been freely elected by a majority of the employees as their representative.

Again, S. 1346 misleadingly tries to equate self-employed professional musical entertainers with construction workers by permitting "prehire agreements." However, the fact that many live musicians form together into bands, purchase their own distinctive equipment, self-finance elaborate productions, and market their talents based on the unique qualities of the group clearly distinguishes them from construction workers. More importantly, musical entertainers have freely chosen to operate as independent small businesspersons, and do not want who they work for and their working conditions dictated by a union.

To assist the union in getting its prehire agreement, S. 1346 authorizes the union to engage in a secondary boycott by legally picketing a purchaser who refuses to enter into a pre-hire agreement, thereby pressuring the purchaser to deal only with the union.

S. 1346 Denies Freedom of Choice

The proponents of S. 1346 argue that the bill would provide basic employment protection to a group of employees who, for many years, has worked without the benefit of Federal safeguards. That statement inaccurately suggests that all musicians have been "locked out" of the NLRA's protections.

To set the record straight, musicians who work or want to work as employees enjoy the same protections and have the same rights as other workers covered by the National Labor Relations Act. They may unionize, they may bargain collectively, and they enjoy all the protections against unfair labor practices that the NLRA provides. Indeed, the American Federation of Musicians claims more than 100,000 members, many of whom as employees (for example, symphony orchestra musicians) exercise their full rights under the NLRA. Many musicians, however, especially those who perform predominantly on the lounge and nightclub circuit, have chosen to operate as independent contractors, thereby seeking the protection of the NLRA from union coercion aimed at making them join. These performers have formed partnerships, co-operatives, and other joint ventures, and have made substantial capital investments in sophisticated electronic equipment, lighting systems, travel vans and trailers, wardrobes, and numerous other items. They want to be able to operate as independent, self-supporting business entities, and should continue to be entitled to the protection provided by the NLRA.

By requiring that all musicians be treated as employees, regardless of their actual legal status, S. 1346 would limit the freedom of a unique group of American artists to choose their work status. The thousands of performers who have established themselves as independent contractors would be forced to enter into involuntary employer-employee relationships, under which the AFM or another union would dictate the terms and conditions of their working relationship.

S. 1346 is Classic Special Interest Legislation

It should be clear by now that the prime beneficiary of S. 1346 will be the AFM and related entertainment unions. All of S. 1346's provisions expand the power of the musicians' unions over individuals who have freely chosen to be independent small businesspersons, not union members.

S. 1346 would grant the unions access to a formidable arsenal of coercive weapons that would foster the compulsory unionization of the entire live music industry. Armed with the right to engage in secondary boycotts and picketing, the unions could make it economic suicide for purchasers of musicians not to enter into "pre-hire" and "hot cargo" agreements. Forced by those agreements to engage only unionized musicians, these purchasers, now considered "employers" under S. 1346's legal fiction, in turn would refuse to hire non-union performers. The bottom line for entertainers will be, "Work union or don't work."

S. 1346 Creates An Ill-Advised and Unnecessary "Legal Fiction"

S. 1346's supporters readily admit that the bill would establish a "legal fiction" for labor law (and perhaps other) purposes. A fiction would indeed be created, one that is not only not needed but which tramples on the rights of thousands of hard-working professional entertainers.

In treating small businesspersons as employees, and forcing anyone who purchases musical performances to assume the status of "employer," S. 1346 would create an employer-employee relationship where NLRB and court decisions have said that one does not exist. This fictional employment relationship would apply without exception. As AFM Legislative Director Ned Guthrie has stated, "the father of the bride or the chairman of the ball is the purchaser of the musicians' services" and would be the "employer" for labor law purposes. Thus, the bride's father or the chairman of the local fireman's ball would be required by federal law to bargain with a musicians' union, could face unfair labor practice charges and legal proceedings, and would be subject to union picketing if they refused to cave in to the union's demands.

S. 1346 Raises Tax and Benefit Questions

Contrary to the claims of the bill's proponents, the fictional employer-employee relationships created by S. 1346 probably would not be "for labor law purposes only." There is no apparent reason why the fiction would not also be adopted for tax and other purposes. Anyone who purchases a musical performance -- from the nightclub owner to the father of the bride -- could be required to withhold taxes, pay workers' compensation and unemployment insurance, pay social security tax, make pension contributions, and comply with detailed paperwork requirements for the performers they hire.

Conclusion

S. 1346 is not an employee rights bill. Musicians working on the lounge and nightclub circuit already are fully covered by the National Labor Relations Act. The only provisions of S. 1346 that concern the rights of individual musicians operate to take away their right to operate as independent contractors.

S. 1346 is actually a union relief bill aimed at enabling the AFM and other unions to force compulsory unionism on a vibrant industry whose trademark is a multiplicity of talented, independent performers. Having tried and failed to persuade lounge and nightclub entertainers to join a union on the basis of what it can offer to them, the AFM now wants a law which will force musicians to join. The proponents of this legislation have tried for several years to achieve that goal, each time without success. Congress should again rebuke this effort to limit the rights of this unique group of American entrepeneurs.

December 10, 1987

MEDIA PROMOTION ENTERPRISES
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January 5, 1988

Senator Howard M. Metzenbaum
United States Senate
Sub-committee On Labor
Washington, DC 20510-6300

Dear Senator Metzenbaum,

Thank you for your inquiries into two specific areas of concern regarding S.1346. Realizing the limited scope of the Sub-committee hearings, I am pleased that you have requested additional information.

Attached are my responses to the two questions posed in the recent follow-up correspondence from Senator Matsunaga.

If you have additional questions or need more information, please contact me at the above address or phone our Washington counsel, Mr. John Tysse, at 789-8600.

Sincerely yours,

William A. Heaberlin

William A. Heaberlin

WAH:cm

Enclosure

Professional Entertainment

Questions from Senator Matsunaga
for William Heaberlin

1. In your testimony you state that the International Theatrical Agencies Association represents over 100,000 entertainers. In what respect do you represent them? Are they members of your organization? Is there a clause in ITAA member contracts with entertainers that states that the ITAA will lobby on behalf of the entertainers?

2. You have repeatedly state that you are concerned about possible changes in the tax law or other laws resulting from the modified definitions of employer and employee under the National Labor Relations Act. As you know, I and Mr. Clay have publicly stated that there is no intent to affect the tax law through this legislation. Would you be satisfied if the bill were amended to clearly state that the new definition only applies with respect to the National Labor Relations Act and not to any other law?

ITAA RESPONSES TO QUESTIONS FROM SENATOR MATSUNAGA

QUESTION 1:

To qualify the relationship between professional musicians and their agents, suffice it to say that this is somewhat analagous to the business relationship between an attorney and his client. Realizing that show business per se has two component parts, the serious artist often engages the service of a manager or producer to work on the show aspects of his performances while engaging the services of an agent to work on the business aspects of his career. Procurement of engagements, career development and planning, and effective marketing of talents are among functions provided by agents.

Historically, the term "artist's representative" has been used to denote one who provides services that are today performed by agents. The point is that agents represent artists in the truest sense of the word. If for example, you wish to book BARBARA MANDRELL, you would need to contact her agent -- not a hiring hall or union official. In fact, the only way to secure the services of most of today's successful attractions is through their true and bona fide representatives -- their agents.

Attached is a letter that appeared in the latest issue of The Showtimes West magazine. It is written by the President of the Phoenix local of the AF of M and clearly points out the differences in situations where musicians are booked by legitimate agents and where they are booked by other musicians acting as "contractors". I am sure that you will find the explanation to be most helpful in understanding this matter.

In reference to the final two parts of QUESTION 1, it is in the above business sense that the ITAA represents musicians. Musicians, for the most part, are not members of our association. We represent them in purely business and professional relationships. It is through our regular contacts with these musicians (our clients), however, that we have learned of their strong opposition to S.1346. If you like, we would be happy to work with the Subcommittee in availing many of these musicians/clients so that they may share their concerns with you on a first-hand basis.

Our lobbying activity, to be sure, is on behalf of ourselves -- a closely knit group of small businessmen and businesswomen who make their livings representing professional entertainers. Acting as liasons between purchasers and performers, we are constantly reminded just how devastating this bill really is for both parties -- and consequently for us as well.

There seems to be quite a bit of confusion on the part of the performing artists and occasionally, purchasers as to the role of a booking agent or even what a booking agent is. Perhaps I can shed some light on this "elusive" subject.

First of all, the State of Arizona requires that booking agents be licensed as an "Employment Agent." This license is obtained by application through the Labor Department of the Industrial Commission. If you have any question as to whether someone is licensed or not, call the Labor Department at 255-4515 for that information.

The definition of a booking agent is: a person, partnership or corporation who for a fee (commission) procures or attempts to procure employment or engagement for musicians (performers). If the agent is signatory to the American Federation of Musicians (a Union Labor Agreement establishing rules and procedures), in addition to having the required state license, the maximum commission is 20 percent on a casual engagement or 15 percent on a steady.

The agent acts as the go-between for the two principal parties of the contract (the act and purchaser) and generally is not a party to the agreement itself. Unless he/she is empowered by a Power of Attorney, the agent cannot sign a contract for either party. He/she has no obligation to collect an unpaid compensation for the act if the purchaser defaults, but the act is not liable for payment of any commission until payment is received (non-payment or cancellation due to a breach of contract by the act might result in commissions being due and payable to the agent for the entire term of the contract).

If the act is paying a commission (directly or forwarded by the purchaser), the agent must continue to represent their interests after a steady engagement begins. For example, on a long "indefinite engagement" where the act feels it has generated a lot of new business while maintaining the old and wants to increase their compensation, the agent is obligated to present their proposal to management. Failure to obtain the requested increase would not infringe on the agent's right to receive commissions, but failure to represent (present the acts request to management) might. By the same token, if the act renegotiates a higher rate with management without giving the agent an opportunity to do so, the act might be held liable for the commissions on the higher amount because there was no failure on the part of the agent to attempt to negotiate.

Commissions are payable for the entire term of the engagement. In addition, it is a usual practice if the act returns to the venue within a specified period of time, the act must pay commission to the original agent regardless of who booked the return engagement (The A.F. of M. signatory agreement limits the time to 60 days, or if in writing, 180 days)

The above does not pertain to "Casual Engagement Bureaus" (CEB) or "Band Leaders" who do not work under the same rules and have different obligations. However, many musicians who work for, and purchasers of the services of these CEBs think they are dealing with an agent who is working for a flat commission. Wrong!

First of all, no license is required (except possibly a business license) as they are not acting as an agent in the true sense of the word. It would be a truer statement to refer to them as an "Employer"! (even though in many cases, their relationship has the musicians as independent contractors) since they themselves are paid or not. If they are determined to be acting as a true employer, they must also withhold taxes as well as provide Workmen's Compensation and Unemployment benefits.

The CEB is a party to the contract as leader (even though he/she may not be present on the job and sends a "sub leader" to perform) while the musicians hired are not. With this type of engagement, there is no commission involved. The funds left over after the musicians are paid is gross profit and could be 20, 50, 200 percent or even more, from which office rental, advertising, clerical help, etc must be paid. The CEB is contracting with the purchaser to provide entertainment for an agreed upon price and then hiring musicians to work for an agreed upon wage. There is no commission involved and no agency relationship exists. It is simply a business selling a service and hiring people to work for a stipulated wage.

To recap: An agent attempts to procure engagements for an act; a CEB hires musicians for work it has contracted. An agent in effect works for the act; musicians work for the CEB. An agent is paid a commission; a CEB sells a package and pays a wage. An agent has no obligations to guarantee payment for the acts services; a CEB is responsible to pay for the services of the musicians it hires whether the client pays or not. An agent represents an act; a CEB represents itself.

I hope this clears up some of the misconceptions about agents, For some reason, it seems to be a hard concept to grasp for many people.

Fred J. Dobelbower,
President
American Federation of Musicians
Phoenix Local 586

QUESTION 2

While the possible tax consequences and other legal ramifications of the bill are clearly areas of much concern to us, these are by no means the only objections we have to S. 1346. As our testimony relates in considerable detail, the problems of the "employer-employee" legal fiction, hot cargo agreements, secondary boycotts, and pre-hire agreements are issues of equal, if not greater, concern.

Under the existing law which has availed stability, growth, and co-operation, the tax issue is not a problem. Nor are the other issues problems. In other words, the law as it is has fostered growth and stability in the entertainment industry to the satisfaction of almost all parties concerned. It seems only the officials of the American Federation of Musicians, who have seen the AFM's membership eroded because professional entertainers have discovered their interests can be better represented elsewhere, believe the changes proposed by S.1346 are necessary.

MLBA

MINNESOTA LICENSED BEVERAGE ASSOCIATION, INC.

John F. Berglund
Executive Director
800 42nd Ave No
Minneapolis, MN 55412
(612) 522-9496

OFFICERS

CHAIRMAN
Thomas C. Wurr
PRESIDENT
Kenn Rockler
EXECUTIVE VICE PRESIDENT
Jim Thomas
VICE PRESIDENT ON-SALE
George McCausland
VICE PRESIDENT OFF-SALE
Larry Margel
SECRETARY
Judy Ryser
TREASURER
Glenn Whiting

December 4, 1987

Senator Howard Metzenbaum
140 Russell Senate Office Bldg.
Washington, D.C. 20510-3502

Re: S1346

Dear Senator Metzenbaum:

Our association, The Minnesota Licensed Beverage Association, consisting of approximately 1,000 taverns, restaurants, and package stores throughout Minnesota, is opposed to S1346 and would respectfully request that a represetnative of our association be allowed to testify on this matter.

Very truly yours,

John F. Berglund
Executive Director

JFB/jc

MLBA

MINNESOTA LICENSED BEVERAGE ASSOCIATION, INC.

John F Berglund
Executive Director
800 42nd Ave No
Minneapolis MN 55412
(612) 522-9495

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Larry Marget
SECRETARY
Judy Ryser
TREASURER
Glenn Whiting

RESOLUTION IN OPPOSITION TO S 1346

WHEREAS, the Minnesota Licensed Beverage Association (MLBA) is a state trade association consisting of approximately, 1,000 taverns, restaurants, hotels, non-profit clubs, bowling alleys and package stores throughout Minnesota, and

WHEREAS, many members of MLBA contract for live entertainment, with the live entertainment members being treated as independent contractors and not as employees, and

WHEREAS, there is legislation pending before the United States Senate, S 1346, that would legally categorize live entertainment as employees of the places where they perform, and

WHEREAS, if MLBA members are required to legally categorize the members of live entertainment as employees, costs will increase resulting in less live entertainment and/or increase costs to the consumer, and

WHEREAS, any benefits accruing to members of live entertainment being categorized as employees are outweighed by the increased costs and loss of jobs,

NOW THEREFORE, BE IT RESOLVED, that the Minnesota Licensed Beverage Association is opposed to S 1346.

Dated this 7th day of December, 1987.

Kenn Rockler, President
Minnesota Licensed Beverage Association

1947-1987 40th Year

NATIONAL BALLROOM AND ENTERTAINMENT ASSOCIATION
P.O. Box 33057, Minneapolis, Minnesota (612) 427-5942

OFFICERS

PRESIDENT
Darrel Hein
Surf Ballroom
460 N. Shore Dr
Clear Lake, IA 50428

VICE PRESIDENT
Bobby Layne
Rt. 6, Box 54
Pla Mor Ballroom
Lincoln, Nebraska

TREASURER
Don Wachal
COL Ballroom
Davenport, Iowa

LEGAL COUNSEL
Steve Roberts
2300 Financial Center
Des Moines, Iowa

EXECUTIVE SECRETARY
Doris Pease
P.O. Box 33057
Minneapolis, MN 55433

LEGISLATIVE LIAISON
William Spence
Hingham, Massachusetts

DIRECTORS

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Four Seasons Ballroom
Dallas, Texas

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Chris Davis
Chris Davis Ballroom
Rialto, California

Larry Herman
Roaring 20's Ballroom
San Antonio, Texas

Dale Higgins
Stardust Ballroom
Erie, Pennsylvania

Neil Hines
Mr. Tunes
So. Sioux City, Nebraska

John Matter
Matters Ballroom
Decorah, Iowa

Don Ring
Park Ponderosa
McFarland, Wisconsin

Allen Schneckloth
Fairyland Park
Long Grove, Iowa

PAST PRESIDENTS

Frances Archer
West Des Moines, Iowa

Dan Belloc
Chicago, Illinois

Tony Jambor
Moundsview, Minnesota

Joe Malec, Jr
Omaha, Nebraska

Robert Raskob
Hamel, Minnesota

Don Ring
McFarland, Wisconsin

William Sheell
N. Olmstead, Ohio

Don Wachal
Davenport, Iowa

11-13-87

Senator Tom Harkin
Senate Office Building
Washington, D.C. 20510

Dear Senator Harkin:

We will address our protest on the important matter of S. 1346 to Kay Casstevens as you have directed us to do. However, this letter is to thank you for never being a co-sponsor on this bill in these many years it has been sponsored by various Senators.

We appreciate very much your not being a co-sponsor and we want you to know we recognize the help you have been to us

Sincerely,

Darrel Hein
President

FOR THE BEST IN LIVE MUSIC AND DANCING

N B E A

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AND ENTERTAINMENT ASSOCIATION**
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McFarland, Wisconsin

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N. Olmstead, Ohio

Don Wachal
Davenport, Iowa

11-13-87

Ms. Kay Casstevens, Legislative Director
Senator Tom Harkin's Office
Senate Office Building
Washington, D.C. 20510

Dear Ms. Casstevens,

We have been advised by Senator Harkin to address our serious concerns about Senate Bill, S. 1346, to you. This bill is also known as "Performing Arts Labor Relations Amendment."

What we would like, since Senator Harkin is a Majority member of the Sub-Committee on Labor, is for him to object to any move calling for a hearing for this bill by the chairman, Senator Metzenbaum.

We recognize this is a repetitious request on our part, but it has been continually an effort on the part of the AF of M to have this bill enacted.

It would cause so much harm to all of our ballrooms to have to add each individual musician to our payroll that we fear it would stop the use of live music which would soon close our doors. The present system, which works well, treats the musicians as Independent Contractors, and we have been working together under this system for all time since social security and witholding.

We sincerely hope you can help us again this Session to keep this Bill in committee. Thank You.

Very Truly Yours,

Darrel Hein, President

FOR THE BEST IN LIVE MUSIC AND DANCING

Est. 1907
Greater Boston
Hotel Association

EDWARD G. McCANN JR
Executive Vice President

MEMBERS

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Boston Harbor Hotel
Boston Park Plaza Hotel & Towers
The Charles Hotel
The Colonnade Hotel
Copley Plaza Hotel
Copley Square Hotel
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57 Park Plaza Hotel/ Howard Johnsons
Four Seasons Hotel Boston
Holiday Inn/Boston Government Center
Hyatt Regency Hotel Cambridge
Howard Johnsons Boston-Southeast
Howard Johnsons/Cambridge
Howard Johnsons/ Commonwealth Avenue
Howard Johnsons/Fenway
The Lafayette Hotel
Le Meridien
The Lenox Hotel
Logan Airport Hilton Hotel
Boston Marriott Hotel/ Cambridge
Boston Marriott Hotel/ Copley Place
Marriott Hotel Long Wharf
The Midtown Hotel
Omni Parker House
Quality Inn/Downtown Boston
Ramada Inn
Ramada Hotel, Logan Airport
Ritz Carlton Hotel
Royal Sonesta Hotel/ Cambridge
Sheraton Commander Hotel/ Cambridge
Susse Chalet Inn
Susse Chalet Lodge
Terrace Motel
Westin Hotel Copley Place

October 16, 1987

Mr. Charles Peterson
Treasurer
National Association of
Orchestra Leaders
34 Metropolitan Oval
New York, NY 10462

Dear Mr. Peterson:

Thank you for your recent letter regarding AFM's latest attempt to pass a Performing Arts Labor Relations Amendment, so called, S. 1346.

I have recently passed this information on to all my members in the greater Boston area, urging them to contact both our United States Senators.

Your continued assistance in alerting us to the progress of this bill is greatly appreciated, as we too share your concern about the potential impact of S. 1346.

Again, thank you for your support.

Sincerely,

EGMcCann Jr

Edward G. McCann, Jr.

EGM:eam

cc: Ken Hine, AH&MA
Bill Sage, MHMA Gov't Affairs

Executive Offices: Statler Office Building, 20 Park Plaza, Boston, MA 02116 (617) 423-1776

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4 September 1987

Senator Paul Simon
Senate Office
Washington, D.C. 20510

Dear Senator Simon:

I am writing in protest to the Senate bill 1346. The Clock Tower in Rockford, which I believe you are fairly familiar with, is currently a purchaser of a great deal of live music. Our commercial guests enjoy it as well as the conventions and associations who meet with us. However, the "PERFORMING ARTS LABOR RELATIONS AMENDMENT" that is being proposed will make us take a very serious look at our future programs when it comes to providing entertainment for our guests.

We feel it is preposterous for us to be considered an employer of live music and that they be employees of the Clock Tower. Musicians are independent contractors who we enter into an agreement with to perform certain bookings or "gigs" as they are commonly referred to. We do not believe that in any way, shape or manner should we be required to pay an employee compensation or workman's compensation taxes or any other requirements of an employer.

To negotiate with the American Federation of Musicians legal authority for terms and conditions or for a business agent to operate in and around our private property would be absurd. Many of our conventions and associations bring in their own musicians or request specific types of live musical entertainers and we feel there should be no restriction on this type of booking yet we feel that there could be some interference in S. 1346.

We would want to continue to hire live musical entertainers based on what our customers want and that compliment our overall philosophy at the Clock Tower.

If S. 1346 passes it would force us to take a serious look at our live musical entertainment program vs. other alternatives. I would earnestly request that you reconsider your sponsorship and support of S. 1346.

Sincerely,

Rex A Parker

Rex A. Parker, C.H.A.
Vice President & General Manager
BEST WESTERN CLOCK TOWER RESORT

RAP:sb
cc ✓Charles Peterson

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John Carleton Orchestra

1555 WHITE RIDGE CIRCLE
RENO, NEVADA 89509
PHONE (702) 825-9193

10-20-87

Senator Harry Reid,
Hart Office Bldg. Rm. 702
Washington,
D.C. 20515

Dear Senator Reid,

I am a twenty-eight year resident of the Reno, Nevada area, and I make my living in the music business as an Orchestra Leader. It follows, therefore, that I would have some opnions on S 1346, which, I understand, the A.F.of M. has prevailed upon you to sponsor in the Senate.

This particular piece of special interest legislation has been introduced quite regularly in the past, each time to lose.

The A.F.of M. have been rebuffed in the courts and before the N.L.R.B. when they attempted to impose their demands upon the Hotels, Clubs and agencies, etc. Indeed, the enclosed text of a decision by the Second Circuit Court of Appeals will acquaint you with the reasons why the Union lost.

S 1346 seeks to force the Hotels, etc. to become the employers of musicians, a role which has traditionally belonged to the Orchestra Leader, an action which borders on piracy. The leader is the one who contacts the Hotels and Clubs to obtain work, and it is his name that is displayed on the marquee. The leader, not the Hotels, write the music that the orchestra plays. If he does not, he must pay someone to do so. To be successful, those arrangements must be unique in the Public's ear, and are a form of identification. The leader employs an accountant and a payroll service, deals with the I.R.S. as any employer would. His musical knowledge is necessary to make decisions with regard to hiring, firing and disciplining his musicians. He helps them to resolve their problems, both musical and personal. In short, he is a businessman who is also an artist, and he has a great deal of money and time invested in his career.

Should this bill become law, it will make the leader merely a figurehead who will be powerless to affect the operation of his business. He will be unable to choose the people he wants to work for him except on the sufferance of the union. Since the union does not find work for it's members, do they expect the Leader to spend time, effort and money to generate work, only to hand the business over to someone else? And why, if the musicians are in need of remedies in their employment field, does the union refuse to negotiate with their employers,- the leaders? Because, until recently, when there were wholesale defections by the membership, they extorted extra work dues from leaders. A booking agency had to have the approval of the union to do business. In short, they controlled both ends of the music spectrum. Is it any wonder that they hope to use you to legitimize this nefarious scheme?

Senator, I urge you to reconsider your sponsorship of this bill. It is a bad bill which has no precedent in labor relations. It is, in fact, communistic in it's aims.

Please feel free to call me if I can be of any assistance in this matter. I have told the National Association of Orchestra Leaders in New York that I would be willing to pay my own expenses to go to Washington D.C. to testify against this bill. I hope and trust that you will make my journey unnecessary.

Yours Sincerely,

John Wm. Carleton.

ecl.
copy file.

VICTORY MUSIC

POSITION PAPER

Since Victory Music's non-profit and all volunteer beginnings in 1969 some 4000 musicians have passed thru our stages in the folk, jazz and acoustic music field. As performers, bookers and as a community arts organization Victory Music is very concerned about the pending legislation of U.S. HOUSE BILL HR 1638 "Performing Arts Labor Relations Amendments". This bill changes the relationship of independent contractor for you the musician to "Employee" and the contracting booking party to "Employer"; allows the American Federation of Musicians (AFM) to insist purchaser's of music negotiate terms that would forbid the purchaser to do business with anyone the Union does not want them too and allow the AFM to place economic pressure on the Purchaser; grants to the union (AFM) the write to force purchasers into pre-hire agreements before musicians are hired (now only allowed in the construction and garmet industries) and thus creating an AFM monopoly without regard to the desires of self-employed musicians or the purchasers. The ramifications are enormous.

The Board of Victory Music, and the Victory Music Membership have unanimously voted to OPPOSE this legislation. We are not opposed to the AF of M Union, but to this legislation. It is very bad legislation for specialty and alternative musics. Victory's opposing position was taken after reading the bill, the labor law it changes, the Union position paper, The International Theatrical Agencies Association position, the legal conclusions for the National Association for Campus Activities and most importantly Victory's attorney, our Certified Public Accountant and our Bookeeper who all independenly represent union and non-union musicians. Victory Music concluded:

1. Alternative, specialty music works with small businesses and organizations that purchase independently contracted music on a one act for one nite basis most of the time. This music's very existence is fragile as are the restaurants, taverns, arts groups and small concert booker that buy the music. HR 1638 would impede and in some cases eliminate purchasers of specialty music because they will not want to deal with Union negotiations, picketing, increased state and Federal paper work, added taxes and increased costs to do business.

2. Under HR 1638 musicians are no longer independent contractors but become "Employees" and the purchaser "Employer". We do not, as the AFM Union claims, work side by side with food servers and bartenders; rather we play for one or two nites on a contract basis. We arrive, set-up and do the contracted work and leave much like a telephone repairman or carpet installer. We are not in any sense employees. As national touring recording artist and autoharpist Lindsay Haisley of Texas states, "I am legally and logically an independent contractor in my relationships to the people and organizations which provide me with the stages on which I play. I choose this realtionship and consider my right to operate in this manner one of the real freedoms which I enjoy as an American." Haisley is a former 6 year member of the AFM Union.

3. Purchaser of music would be forced to negotiate pre-hire agreements with the Union; and the Union thne has the power to picket that purchaser. No small business can face that and continue to book alternative music once or twice a week. Bob Erdos producer of 100 traditional jazz recordings on his Stomp Off Records says, "I am concerned about the welfare, specifically ability to get jobs, of the skilled, but not "big name", musicians who play the kind of music my label encourages. Hirers of their musical talent will simply not hire them as individuals or groups if first they must negotiate a pre-hire agreement with the AFM Musicians Union. The less popular artists do not produce enough revenue for the restaurant, tavern, organization, etc. to make them want to so negotiate or risk a picket."

4. Victory Music's legal counsel, our corporate CPA accounting firm and our bookeeping tax counsultant firm have all informed us that in their opinion if HR 1638 passes and musicians become "employees" a) musicians will lose their mileage-auto deduction on Federal Income Taxes on mileage to and from the job; b) the door will be open immediately in the state of Washington to require Workman's Copensation and Unemployment taxes and the paper work on every musician will have to be provided by the music purchasers because they would now be "employers"; c) no matter what the Union AFM may claim, it most likely the IRS will look to the now "employers" for the "employee" musicians Social Security and Income Tax Witholding and the accompanying paper work. True HR 1638 does not change the tax law. But the tax law does not have to change for the IRS to change interpretation as they have done three times in past years on deduction of home office space. The key words here are 'linkage', 'precedents' and 'appearances'. Does HR 1638 change the relationship, the linkage, between the purchaser and the independent contractor musician. It most surely does. The purchaser becomes "employer" and the independent musician-contractor becomes "employee". This is a major linkage in the eyes of any taxing body. Imagine the impact on a small club, non-profit music organization, restaurant etc. Professional folk-

traditional recording and international touring artist Danny Carnahan put it this way, "But most venues for our music are run by part-timers or well-meaning volunteers who barely have enough time to be organized as it is. These people do not have time nor skills to become employers (as HR 1638 would designate them) or to cover the necessary paperwork and tax documentation that would entail. So what will happen? Unable to satisfy the law, the venues will reluctantly close down. We will no longer have access to enough venues to be able to make a living in music."

5. The music industry and particularly the alternative and specialty musics are unique. This legislation does not address these musics. Niles Hokannen in his Galactic Crossroads mandolin magazine states in oppositon, "It seems bizarre to try to apply labor laws pertaining to construction and garmet industries to all musicians including alternative musicians. The union can be effective where there is a true employer status, such as symphony, hotel orchestras, etc. where the musician is on a salary or is working fulltime at a place. But it just is not practical to apply this mentality to bands playing one and two nighters."

Victory Music's concern has always been for the local alternative and specialty musics and the heritage they represent. HR 1638 introduced in 1987 threatens the very fiber of what we do. If the bill passed we would drop our concert series, old time dance and Concert For Kids series. Victory's all volunteer staff cannot handle the paperwork, tax load and negotiations with the union. IN talking with local club, tavern, restaurant and arts organizations in Western Washington they said they would have to seriously consider dropping their music programs, everyone of them. Again Danny Carnahan best sums it up "The small bars, restaurants and clubs , the meeting in churches and Grange halls across America provide a last fragile link between Americans and their own folk traditions. The American folk audience can only rarely find this music through the popular media. No one is getting rich playing this music. We do it because we love it and because we believe in the American ideal of making a living doing what we love.... this bill acts directly to deprive the American folk audience of a fundamental piece of its heritage. It would strike at, and perhaps destroy the American folk network...". Folk, songwriters, jazz, ethnic, old time dance, traditional jazz, new age, country, new wave experimental, classical, barbershop quartets, all should be concerned now. IN the last session of Congress we stopped almost the exact same legislations in committee, but we almost lost and this year the votes are very much against us and the union is pouring money and letters into the campaign to get this passed.* Victory is currently getting the names of the committees, committee members and the sponsors of the bill, so that you can write in opposition to HR 1638 Performing Arts Labor Relations Amendments. PLease call or write and we will tell you how you can help. Victory Music POB 7515 Bonney Lake, Wa 98390 206/ 863-6617.

Thanks for taking time to read and try and understand this.

Musically yours,

Chris Lunn, Volunteer Director
of VICTORY MUSIC

IT DOES NOW
SAME AS S.1346

*HR 1638 has no Senate version yet and was referred to House Committe on Education and Labor which on April 20, 1987 referred it to the subcommitte on Labor Relations chaired by William Clay of Missouri, a sponsor of the bill. Committe members are:

William Ford-Michigan
Mario Biaggi-New York
Charles Hayes-Illinois
Major Owens-New York
Thomas Saywer-Ohio
Austin Murphy-Pennsylvania
Jim Jontz-Indiana
Marge Roukema-New Yersey
Richard Armey-Texas
Harris Fawell-Illinois
Cass Ballinger-North Carolina
Thomas Petri-Wisconsin

SPONSORS OF THE BILL FROM THE HOUSE OF REPRESENTATIVES ARE:

William Clay-Missouri
Robert Wise Jr.-West Va.
Pat Williams-Montana
Robert roe-New Jersey
Mathew REnaldo-N.Jersey
Sander Levin-Michigan
Claude Pepper-Florida
Nick Rahall II-West Va.
Louis Stokes-Ohio
Bruce Vento-Minn
Paul Kanjorski- Penn
Joe Kolter-Penn
Marci Kaptur-Ohio
Robert Garcia-New York
John Lewis-Georgia
Gerry Sikorski-Minn
Harvey Staggers Jr.-W.Va.
Fofo Sunia-Samoa
Frank Guaini-New Jersey
Alan Mollohan-W. VA.
Mario Biaggi-New York
Lane Evans-Illinois
Stephen Solarz-New York
Marin Sabo-Minnesota
Dale Kildee-Michigan

STATE OF WASHINGTON CONGRESSMEN: John MIller;Rod Chandler;Don Bonker;Mike Lowry; Al Swift;Norm Dicks; Tom Foley

All the above may be written: The HOnorable (Congressman's Name), United States House of Representatives, Washington D.C. 20510

Dear Senator or Representative;

I am opposed to the Performing Arts Bills S. 1346 and H.R. 1638 or any bill that would attempt to make musicians **employees** for any purpose or give unions the automatic right to interfere in my direct bargaining with purchasers of music or entertainment.

My signature on this petition authorizes Charlie Peterson of the National Association of Orchestra Leaders, or Thom Sweet, President of the Minnesota Association of Theatrical Agencies, or their representative, to speak in my behalf.

NAME	ADDRESS	DATE
Cliff B[illegible]	Forest Lake VFW	469-6827
[illegible] Millette	8100 Pleasant View Dr. Mpls 55432	12/7/87
Pat Ernes, jr	700 W. Co. Rd. C Roseville MN	12-7-87
[illegible] Heit	5131-34th Av. So. Mpls 55417	〃
Ray Hitchcock	710 LAKESHORE DR. Richfield 55423	12/7/87
Carl Hinrichs	681 Red Oak Dr. Big Lake Legion	12/7/87
Laverne Baumgartner	Rt 1 Box 69A Big Lake Legion	12-7-87
James Daniels	Box 37 Becker Minn Legion 55308	12-7-87
John C. Riebel	534 8th Ave Becker Mn 55308	12-7-87
Perry A. Sutherland	355 W. BROADWAY FOREST LAKE MN. 55025	12-7-87
	355 W Broadway F.L. Mn	12-7-87
Sharon Johns	355 W Broadway F.L. MN	12-7-87
Ed Ewert	P.O. 88 Forest Lake Minn	464-4074
William P. Keaveny	847-1st Ave. No Bayport, Minn	12-7-87
Richard W Peterson	13956 21st N. STILLWATER, MN	12-7-87
Ray Shalen	371 No 5th St Bayport, Minn	12-7-87
Bob Schell	1224 N 3rd St. Stillwater, Mn	12/7/87
Lloyd Wetzler	1451 - S Greeley St. Apt 114	12/7/87
Jack Shelton	Elbo 173 [illegible] Stillwater Mn	12/7/87
JOHN ADAMS	CAMB AMERICAN LEGION BOX 508 CAMB MINN	Dec 7/87

Dear Senator or Representative;

I am opposed to the Performing Arts Bills S. 1346 and H.R. 1638 or any bill that would attempt to make musicians **employees** for any purpose or give unions the automatic right to interfere in my direct bargaining with purchasers of music or entertainment.

My signature on this petition authorizes Charlie Peterson of the National Association of Orchestra Leaders, or Thom Sweet, President of the Minnesota Association of Theatrical Agencies, or their representative, to speak in my behalf.

NAME	ADDRESS	DATE
[illegible] I Charlle	2467 CROIXWOOD STILLWATER MN	12-7-87
Ed Prince	17810 Halros St N W Ramsey Mn	12-7-87
Robert Mork	14545 RANCH Rd ELK RIVER, MN	12-7-87
Linda Turner	1854 Main Elk River, Mn	" "
Tom Duggan	562 6TH ST ELK RIVER MN	12-7-87
Don Knight	1374 109th Blaine Mn	12-7-87
Dave Augustin	13974 3rd Ave No. Zimmerman	12-7-87
Geo Schmidtknes	11000 HWY 10, LOT 30, RICE Mn	12-7-87
Rose Kirschbaum	30 Box 506 Big Lake Mn	12-7-87
Cliff Krieger	12754 Fremont Ave. Zimmerman	12-7-87
[illegible]	3200 77th Ave. N. Brooklyn Park, Mn.	12-7-87
Bonnie Mortenson	909 Bradford Ave Champlin Mn	12-7-87
Jan Calder	5010 Brooklyn Blvd. Brooklyn Ctr	12/7/87

NAME	ADDRESS	DATE
Jill Ziegenhagen	1810 Ashland Ave. #10 St. Paul MN 55104	12/8/87
Roger Hernandez	3543 10 th Av So Mpls 55407	12/8/87
Mefriet M. Ceeron	203 Virginia Street St. Paul 55102	12/8/87
Laurene Ducharme	1019 38th ave Anoka	12/8/87

Dear Senator or Representative;

I am opposed to the Performing Arts Bills S. 1346 and H.R. 1638 or any bill that would attempt to make musicians **employees** for any purpose or give unions the automatic right to interfere in my direct bargaining with purchasers of music or entertainment.

My signature on this petition authorizes Charlie Peterson of the National Association of Orchestra Leaders, or Thom Sweet, President of the Minnesota Association of Theatrical Agencies, or their representative, to speak in my behalf.

NAME	ADDRESS	DATE
[illegible]	5409 W. 54th St Edina	12/6/87
Jean Karnegis	5604 Valley Lane Edina	12/6/87
[illegible]	3110 Union Terr. [illegible]	12/6/87
Joyce B. Connor	3631 N. Thomas	12/6/87
[illegible]	4236 Wash. St. NE	12/6/87
Deb Sullivan	255 Egret Blvd	12/6/87
Bruce Webb	2810 Fremont ave N. Mpls	12/6/87
[illegible]	2200 Pearson Pkwy Brooklyn Pk	12/6/87
[illegible] Steele	294 Ruth St N./ St Paul 55449 55119	12/6/87
Jerry Connor	3631 ~~36~~ Thomas Ave N. Mpls MN 55412	12/6/87
[illegible]	4215 Colfax ave N mpls mn 55411	12/6/87
Marcella Stevenson	4500 - Winchester Lane Mpls 55429	12/6/87
[illegible]	2250 Pearson Pkwy Brooklyn Park	12/6/87
[illegible]	Rural Box 272 Cannon Falls MN	12/7/87
[illegible]	5304 - 47 [illegible] St	12/8/87
Mary K. [illegible]	5504 Woodcrest Dr.	12/8/87
Maureen Pearson	6208 Halifax	12/8/87
Isabel Robb	2230 Midland Grove Rd	12/8/87
Lois Robb	" " "	"
Don Robb	" " "	"

Dear Senator or Representative;

I am opposed to the Performing Arts Bills S. 1346 and H.R. 1638 or any bill that would attempt to make musicians **employees** for any purpose or give unions the automatic right to interfere in my direct bargaining with purchasers of music or entertainment.

My signature on this petition authorizes Charlie Peterson of the National Association of Orchestra Leaders, or Thom Sweet, President of the Minnesota Association of Theatrical Agencies, or their representative, to speak in my behalf.

NAME	ADDRESS	DATE
[illegible] G. Greene	Chisago Lakes UFW Lindstrom MN 55045	12/7/87
Douglas J. Greene	" " " " " "	" "
Tom [illegible]	Belview Am Legion Belview Mn 56214	12-7-87
Robert C. Steele	421 3rd St Farmington MN U.F.W.	7 Dec. 87
Benny D Munson	9137 S Hwy Dr Lexington Md	7-Dec-87
[illegible]	Rt 3 Cambridge, Mn. 55008	12/7/87
Jim [illegible]	R# 2 Isanti, MN 55040	12/7/87
Don Akerson	P.O. Box 55 Isanti. Mn 55040	12/7-87
[illegible] Dahl	Rt 2 Box 179 Rush City Minn	12/7-87
Sven Olsen	Rt 2 Box 301 Rush City MN	12/7-87
George Hultman	R1 Box 202 Braham Mn	12/17/87
Winfred G. [illegible]	Rt 1 Box 153-A Rush City Minn	12-7-87
[illegible]	Apt 1217 Jefferson Hwy Champ.	12/7/87
[illegible] Wendell	704 [illegible] Rd Champlin Mn 55316	12-7-87
[illegible]	[illegible] Mpls 55412	12-7-87
Pat [illegible]	[illegible] Roseville, MN 55113	12-7-87

naca
National Association
for Campus Activities

PO Box 6828
Columbia, SC 29260
803-782-7121

September 21, 1987

Senator Howard M. Metzenbaum
Senate Building, RSOB-140
Washington, DC 20510

RE: Performing Arts Labor Relations Amendment, S.1346

Dear Senator Metzenbaum:

I am Executive Director of the National Association for Campus Activities, an organization that represents more than 1,000 colleges and universities throughout the United States. We also represent many self-employed, full-time, professional, traveling musicians and their agencies who arrange engagements for these musicians at colleges and universities. NACA and its members oppose the legislation S.1346 and attempts by the American Federation of Musicians to alter the effective and satisfying business relationships currently provided by the Labor Management Relations Act.

Please accept this letter as our request to participate in and appear at any hearings you may schedule for S.1346. I will appreciate advance notice of any hearings and notification of any changes in the bill's status.

Perhaps unknowingly, sponsors of S.1346 may be supporting legislation which could jeopardize the economic welfare of a larger class of higher education institutions. We hope you will allow these institutions to be heard before action is taken on S.1346.

Sincerely yours,

Steve Slagle
Executive Director

cc: Senator Spark M. Matsunaga
Caryl Stern
Robert J. Janowitz
Charles Peterson

STATEMENT
OF
STEPHEN SLAGLE
FOR THE
NATIONAL ASSOCIATION FOR CAMPUS ACTIVITIES
BEFORE THE
LABOR SUBCOMMITTEE
OF THE
LABOR AND HUMAN RESOURCES COMMITTEE
OF THE
U.S. SENATE
REGARDING S.1346
DECEMBER 10, 1987

Stephen Slagle
Executive Director
National Association for Campus Activities
Suite 200, 3700 Forest Drive
Columbia, South Carolina 29204

naca
National Association
for Campus Activities

PO Box 6828
Columbia, SC 29260
803-782-7121

December 8, 1987

Mr. Chairman, Honorable members of the Labor Subcommittee, I am Stephen Slagle, Executive Director of the National Association for Campus Activities (NACA).

The NACA is a non-profit, tax-exempt association representing 1,100 colleges and universities, 500 associate member business firms in the entertainment industry, and thousands of musicians and performers represented by our associate members. In its 28 years as an organization, NACA has worked to improve and positively impact the working relationships established between its college and university membership and the performing artists engaged to provide cultural enrichment programs for the nations' campuses.

NACA opposes the Performing Arts Labor Relations Amendments designated in the U.S. Senate and House of Representatives as S.1346 and H.R.1638, respectively. Because NACA represents purchasers, independent contractors, booking agencies and musicians' union members within our membership, we are particularly aware of the unique relationships between purchasers and performers of musical services.

From our unusual and unique vantage point, we have observed for many years the productive and rewarding business negotiations conducted between students and administrative staff at our campuses and the artists and agencies serving these institutions. We, and our members, feel the current law, as provided by the National Labor Relations Act, is quite adequate and satisfying. Institutions of higher education, public or private, do not need or wish to become the employers of artists and musicians. In those states and locales where union representation and collective bargaining are both appropriate and accepted, colleges and universities already engage in contracts benefiting union members. The existing law serves the interests and needs of the campus purchasers of musical services, and musicians within our membership do not complain that their needs are ignored, nor do they desire further representation. Quite the contrary, as campuses traditionally negotiate and pay higher performance fees than are usually obtained by musicians in other marketplaces, S.1346 may, rather ironically, cause many artists to actually earn less through the collective bargaining measures, pre-hire agreements and hot cargo provisions called for in the proposed amendments.

NACA does not take the position that unions are bad influences on society or do not serve a useful purpose. NACA simply opposes the intent of the amendments and the implications the changes to the law would have for NACA members. We believe the changes called for in S.1346 and H.R.1638 are potentially harmful, inhibiting and disruptive to the effective working relationships between educational institutions and musicians, performers, artists and their booking agencies and managements. The proposed amendments badly distort the reality of working relationships in the performing arts. The bill's attempts to equate the performing arts with the construction and garment industries seem to ignore the unique characteristics of the performing arts business.

With respect to the bill's independent contractor provisions, S.1346 seeks to create an exception in the performing arts that is not recognized in any other industry. A person in the independent contractor status is in no real sense an "employee" of the person with whom he contracts to perform. S.1346 would create a strange fiction in the performing arts whereby persons who are admittedly independent contractors would be labelled "employees" for purposes of collective bargaining under the

National Labor Relations Act. The majority of musicians performing on college campuses are touring musicians and do not want or need employee status or representation in collective bargaining.

The exemptions and provisions provided in S.1346 to allow pre-hire agreements, hot cargo agreements, and secondary picketing and boycotting would create undue hardships on campuses and undesirable relationships between purchasers and performers. While these collective bargaining techniques may be necessary and helpful in the construction and garment industries, they seem oddly out of place in a world of artistic expression and creativity. These techniques offer the performers' unions weapons of coercion not presently given by law to most other unions in the private sector.

Rather than becoming beneficiaries of the amendments' provisions, independent contractor musicians and those educational communities they enrich may end up as victims of an ill-conceived, unnecessary and detrimental law. As an association which fosters and nurtures a spirit of partnership and cooperation between the educational and entertainment communities, NACA requests the Labor Subcommittee to leave intact the current law which is not broken, needs no fixing, and which serves our society extremely well.

Thank you, Mr. Chairman, and committee members for the opportunity to present the views of those who may be adversely affected by passage of S.1346.

Stephen Slagle

Stephen Slagle
Executive Director
National Association for
Campus Activities

STATEMENT OF THE
AMERICAN HOTEL & MOTEL ASSOCIATION
TO THE
LABOR SUBCOMMITTEE OF THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
FOR THE HEARING HELD DECEMBER 10, 1987
ON S. 1346, THE PERFORMING ARTS LABOR RELATION
AMENDMENTS ACT

The American Hotel & Motel Association is a federation of hotel and motel associations located in the fifty states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands, having a membership in excess of 8,900 hotels and motels accounting for over 1.3 million rentable rooms. Inclusive in our membership are all of the major hotel and motel chains. AH&MA appreciates this opportunity to present testimony in opposition to S. 1346 the Performing Arts Labor Relations Amendments.

The hotels and motels which make up this Association are frequent users of musicians in their properties and the vast majority of them have established a relationship with these musicians over the years of independent contractor and purchaser of services. The first major stumbling block that our Association sees therefore, is that this legislation seeks to convert an independent contractor relationship into an employer-employee relationship and by so doing create rights in a union to which it has no legal entitlement or expectation. The legislation seeks to accomplish this distortion of employment reality by establishing a mandatory redefinition of both "employer" and "employee" thereby creating the legal fiction that so disturbs our members. In essence, this law seeks to tell both hotel/motel purchasers of music and independent contractor musicians that they have lost the right in labor relations law to have this relationship. Yet there has been no general showing that either the purchasers or the independent contractors want or need this change.

The only proponent who has come forth in support of this bill is the one that has a vested interest in its passage, namely the American Federation of Musicians which seeks to increase its diminishing membership rolls and hopes to do so as a result of this legislation. The principal thrust of the Musicians union seems to be that since they represent musicians the federal law ought to be changed to pressure non-union musicians who have chosen to remain outside the Union to join.

In furthering its efforts to attempt to justify this legislation, the Musicians Union seeks to equate musicians with two other groups whose particular labor needs led to two amendments to the National Labor Relations Act (NLRA) in the past. Finding only surface similarities, the proponents nonetheless leap to the conclusion that the coverage granted by these two amendments should apply equally to musicians without any real showing of analogous labor problems.

The union would have Congress add musicians to Sections 8(e) and 8(f) of the NLRA which were originally enacted to grant needed protections to construction workers and garment workers. The proponents of this bill would have you believe that musicians have the same problems that these workers did and are therefore entitled to the same treatment under the law. The "fragmented nature of production" referred to by the sponsors in a published statement is an attempt to equate musicians who play in many locations with garment workers who work in many locations and thus serve as a justification for the 8(e) exemption. But this comparison has no relevancy at all when applied to musical entertainment since each musical performance in a hotel/motel property is a unique event taking place independent of any other similar performance. There is no commonality in the many performances -- each is fully independent.

Similarly, the attempt to fit musicians under Section 8(f) by authorizing the Musicians Union to forge "pre-hire agreements" to aid collective bargaining and force unionization relies on the assumption that musicians have the same problems as construction workers because both experience short duration work. But going beyond that, no further indication exists that the industries are similarly situated. Another reason offered to justify the change in Section 8(f) is that many musicians fail to remain working at a hotel for the 30-day period needed by the Union to begin organizing. But, this alone does not entitle the Union to a change in Section 8(f). Had there been a showing that musicians and purchasers of their services were at loggerheads over collective bargaining or that musicians were in some other way being frustrated in their dealings such a fact may carry some weight. Musicians are not "new hires" for a hotel/motel, but are individuals who enter into a series of contracts with successive places to exhibit their talents.

If these professionals desired union representation and employment status they would already be members of the AFM and would be joining with it in calling for this relief. But the musicians are silent, evidence they prefer the current historic practice of establishing an independent contract according to the musicians' popular worth. To force unionization on those individuals only protects a failing union and does not help the independent contractors who have chosen other means to earn their living.

The intended result of these changes is to do away completely with the current system which musicians use to obtain contracts. If a purchaser such as a hotel enters into a pre-hire agreement, all musicians who want to remain independent of union membership become disadvantaged. In fact, they are out of work with that property and eventually other properties as forced unionization snowballs. Shrinking employment opportunities create coercion for musicians to join the Union which then gives the Union an enhanced position when it goes next door to the next purchaser of musical services. This may be good for the Union, but it is not good for the purchaser and supplier of music who have had an unwanted third party injected into an independent contractor relationship which satisfies both parties.

A final concern is that of the tax consequences that flow from the employer - employee relationship. One of the most interesting sidelights in this current legislative struggle is how the AFM has changed its tune on this aspect of the bill.

In 1984, testifying before the House of Representatives' Labor Management subcommittee, AFM witness Ned Guthrie attached a letter from his Las Vegas local as Exhibit A. This letter complains about the tax situation and the losses to federal and local treasuries for FICA and other taxes. The author points out that the bill then under consideration "would go far in correcting these inequities that now exist".

That makes it clear that tax burdens being imposed on purchasers of music was within the understanding of the AFM in 1984 under a previous, but virtually identical, Congressional version of this bill. Despite the current protestation of sponsors and proponents of this bill that no tax implications will flow from this bill we have no reason to assume that the Internal Revenue Service will not begin to treat what was an independent contractor relationship in a new light when the relationship is redefined for NLRA purposes.

The change in definition and amendments to Section 8(e) and 8(f) are not intended to be empty acts, they are an attempt to create a favored situation for a single union which will affect the providing of live musical services in our country. Inevitably, many purchasers of live music will shift to prerecorded music. Those who retain live music will gradually be forced by the AFM to hire only union musicians. This is clearly the goal of the AFM, why else would it go to such extraordinary length in this futile effort? This unionization will inevitably force out of the business those musicians who wish to retain their independent status and do not want union interference. To suggest that in this changed environment the IRS will not insinuate itself is to say the least naive.

In conclusion, the changes in the law called for by this bill are an unneeded intrusion into a long established viable system of independent contractor musician and purchaser of musical services both of whom favor the current system. We call for Congress to again take no action on this legislation.

STATEMENT

OF

CHARLES PETERSON,

(ORCHESTRA LEADER)

AND

TREASURER,

OF THE

NATIONAL ASSOCIATION OF ORCHESTRA LEADERS

IN OPPOSITION TO

S. 1346 & H.R. 1638

CHARLES PETERSON
THEATRICAL PRODUCTIONS, INC.

ENTERTAINMENT • MUSIC FOR
CONVENTIONS · BANQUETS · SPECIAL EVENTS

34 METROPOLITAN OVAL
NEW YORK, NY 10462

863-8997

CHARLES PETERSON
THEATRICAL PRODUCTIONS, INC.
ENTERTAINMENT • MUSIC FOR CONVENTIONS · BANQUETS SPECIAL EVENTS
34 METROPOLITAN OVAL • NEW YORK, N.Y. 10462 • (212) 863-8997

December 23, 1987

STATEMENT IN OPPOSITION TO

S.1346 & H.R.1638

These bills seek to reverse approximately 200 National Labor Relations Board charges and complaints filed by the National Association of Orchestra Leaders. Many filed as early as 1967. The charges and complaints initially alleged violation of Section 8(b)(4)(ii), (A) and (B), and Section 8(e) of the National Labor Relations Act. These charges and their subsequent hearings resulted in Settlement Agreements, Board Orders, Court Enforced Orders and indeed, one contempt citation against the American Federation of Musicians and certain of its locals. The statements in support of the charges and complaints only concerned the violations of the rights, privileges and duties of:

a) orchestra leader employers
b) partnerships
c) single entrepreneurs,

all of whom under the Act are independent contractors and so found by the Board and the Courts. Nowhere in any of our National Labor Relations Board and Court successes was there any relief sought for employees. The decisions only held that such categories; a), b), and c) above, were independent contractors.

There was never Board or Court decisions, as alleged by the sponsor of S.1346, Senator Spark M. Matsunaga, that "they (musicians) were informed by the Board (NLRB) that they were independent contractors,***". See Exhibit A, page S.7885 of the Congressional Record, June 9, 1987, the date that Senator Matsunaga introduced S.1346 wherein he said that the Board informed musicians "that they were independent contractors." All affected parties in NAOL cases were informed by the Board that only orchestra leader employers, partnerships and single entrepreneurs were independent contractors.

As a showing that the Board and the Court decisions only referred to categories a), b), and c) as independent contractors and that the Board and the Courts did not, as suggested by the sponsors of S.1346 and H.R.1638 that all musicians were found to be independent contractors, and that the Board and the Courts never ruled that all musicians were independent contractors and that the decisions only confirmed the status of orchestra leader employers, partnerships and singles as independent contractors, and that there was never any decision either by the Board or the Courts showing that all musicians are independent contractors, I attach as Exhibit B, copies of NLRB decisions, settlements and court decisions, just part of the many.

While most NLRB and Court decisions were processed prior to 1979, there remained approximately 50 cases filed with various NLRB regions throughout the states that were consolidated and referred to the NLRB General Counsel in Washington for settlement. All of those cases were ordered for trial before administrative law judges. However, the NLRB General Counsel, at that time, Mr. Lubbers, decided that these particular cases should be, consolidated and settled by conference between the parties. The parties being the National Association of Orchestra Leaders, the charging party and the American Federation of Musicians, the parent body and certain of its locals. These case settlements were offered to the NAOL for their approval. While the AFM approved the Settlement, the NAOL refused. The NLRB, however, approved the Settlements despite our protests--that the Settlements "did not go far enough." A copy of that Settlement titled "AN UNDERSTANDING" was published in the Official Journal of the musicians' union and is attached hereto as Exhibit C. A close reading of that Settlement will show that the Settlement was a result of charges filed alleging violation of the rights of only orchestra leader employers, partnerships, and single entrepreneurs and not all musicians. Mr. Wilbur Friedman, Advice Section of the NLRB in Washington will confirm that the Settlement only concerned orchestra leader employers, partnerships, and single entrepreneurs.

Now then, in a letter addressed to Variety, the trade publication, the sponsors of S.1346 and H.R.1638 referred to the Second Circuit Court of Appeals decision. Copy attached as Exhibit D. In that letter, sponsors of S.1346 and H.R.1638 specifically, Senator Matsunaga and Congressman Clay, argued that "The Second Circuit Court of Appeals held that they were independent contractors rather than employees,". The sponsors by that statement aver that the Second Circuit Court of Appeals held that all musicians were independent contractors. The letter to Variety should have stated that the Second Circuit Court of Appeals held that the orchestra leaders "were employers--independent contractors rather than employees". A copy of that courts decision attached as Exhibit E, refutes the statement by the sponsors. Variety, the trade publication, when they published the news item, correctly quoted the Court and if read thoroughly by the sponsors or their aides should have discovered that the Court ruled that the orchestra leaders were the employers of the musicians, and that the hotels were not. (Employers under the Act are independent contractors.) A copy of that Variety item attacked by the sponsors is attached hereto as Exhibit F.

Variety, following the demise of S.670, a similar bill introduced in 1986 by Senator Pell, correctly quoted that Courts decision reporting that,

> "the AFM supported the introduction of the bill (S.670) as a result of the ruling in the U.S. Court in Puerto Rico that orchestra leaders are the employers of the musicians they hire". Copy attached as Exhibit G.
>
> (My underscoring.) Employers are independent contractors.

I now refer to a further Variety item dated December 8, 1982, where, following the same Second Circuit Court of Appeals decision, the then President of the American Federation of Musicians, Victor Fuentealba, said,

"It's hard to comprehend how this decision could have been reached," said Fuentealba. He said that orchestra leaders (rather than hotel owners) will now have to negotiate musicians' minimum salaries with local unions." (My underscoring.)

Copy of the Variety item carrying this quote is attached hereto as Exhibit H. The musicians' union still has this option and in fact--duty!

Conclusion

Since there is no showing that the NLRB or the Courts have held that all musicians were as the sponsors of S.1346 and H.R. 1638 claim, independent contractors and since the NLRB charges filed by the National Association of Orchestra Leaders and the resultant--decisions only concerned the status of orchestra leaders, partnerships, and singles as independent contractors and since the sponsors and the American Federation of Musicians have not made any showing, nor is there any showing that the Board or the Courts have ruled that all the musicians are independent contractors and since all of the Board Orders, both Court enforced orders, and the contempt citation and Court decisions are cited, some attached as Exhibit I, the allegation that all musicians are independent contractors and have been so found by the NLRB and the Courts is pure fiction, and contrary to Board and Court decisions. As a result, this bill, S.1346 and its companion, H.R. 1638 should be rejected and the industry should be permitted to function under well-established and well-reasoned decisions as they affect the entertainment industry.

Respectively submitted,

Charles Peterson

Charles Peterson

[Note: In the interest of economy, the exhibits referred to were retained in the files of the committee.]

AMERICA'S HAPPIEST MUSICIANS
American Musicians Union, Inc.
8 TOBIN COURT
DUMONT, NEW JERSEY 07628
Tel. (201) 384-5378

December 8, 1987

Senator Howard N. Metzenbaum
Chairman Senate Subcommittee on Labor
Russel Building
Washington, DC 20510-6300

Dear Senator Metzenbaum:

In response to your letter dated December 2, 1987, we must voice our disappointment in not being able to testify against the proposed Bill S. 1346.

The American Musicians Union, Inc. (AMU), has had great difficulty in the past in protecting its membership from the tyrannical abuses of the American Federation of Musicians (AFM). On several occasions, we had to file complaints against the AFM for violation of the rights of our members to perform musical services. In each case, the Labor Department supported our right to perform without fear of intimidation by the AFM. Financially, AFM has assets at least 10,000 times greater than our Union, and we depend on the existing Labor Laws to protect our rights to exist.

Without help from the Labor Department, we do not have the resources to resist the well documented abuses perpetrated by AFM. Many of our members came to our Union from the ranks of AFM, after suffering demeaning abuse by the dictatorial and arbitrary discipline bestowed by AFM. Many others have joined us to avoid being associated with AFM.

Letter from AMU to Sen. Metzenbaum, dated December 8, 1987 - Page 2.

At this time, our members exist as independent contractors. However, if this legislation is passed, our members will be considered "employees". This will allow AFM to use the secondary boycott to picket our "employee" members, to disrupt deliveries, call out waiters, bell hops, cooks, etc., from establishments at which our members perform. IT WILL LITERALLY PUT OUR UNION OUT OF BUSINESS, after we have faithfully served our members and have promoted opportunities for them to develop their careers OVER THE PAST FIFTY YEARS! Therefore, this legislation, if passed will deprive our members of the ability to work as AMU musicians.

On behalf of the thousand or so members of AMU, enrolled in a half dozen AMU locals, I ask you not to support this terrible legislation which will destroy our Union.

Respectfully yours,

Ben Intorre

Ben Intorre, Pres. & Treas., AMU.

cc Sen. Bill Bradley
Sen. Frank Lautenberg
Labor Subcommittee

AMERICA'S HAPPIEST MUSICIANS
American Musicians Union, Inc.
8 TOBIN COURT
DUMONT, NEW JERSEY 07628
Tel. (201) 384-5378

AMERICAN MUSICIANS UNION, INC. STATEMENT IN OPPOSITION TO S. 1346

DECEMBER 16, 1986

AMERICA'S HAPPIEST MUSICIANS

American Musicians Union, Inc.

8 TOBIN COURT
DUMONT, NEW JERSEY 07628
Tel. (201) 384-5378

The American Musicians Union, Inc. (AMU) is an Independent Union, associated with the National Federation of Independent Unions. (NFIU). We have several locals located in the North-East and Mid-West States. We are not affiliated with the American Federation of Musicians (AFM).

Our organization has been in existence for 50 years, of which we have used the name "American Musicians Union, Inc." for 40 years.

We have been able to exist, remain independent, and compete with the AFM, largely because of the existing Labor laws, which prevent the AFM from interfering with our musicians through picketing, secondary boycotts, etc. Thus our members have been able to perform at catering halls, clubs restaurants, etc., without problems with the AFM. Prior to the existing laws, the disruption of such private and public affairs such as weddings, anniversaries, and dinner dances by AFM was a common occurrence.

The American Musicians Union, Inc. (AMU), has had great difficulty in the past in protecting its membership from these tyrannical abuses of the American Federation of Musicians (AFM). On several occasions, we had to file complaints against the AFM with the Labor Department for violation of the rights of our members to perform their musical services. In each case, the Labor Department supported our right to perform without fear of intimidation by the AFM. Financially, AFM has assets at least 10,000 times greater than our Union, and we depend on the existing Labor Laws to protect our rights to exist.

Without help from the Labor Department, and the existing laws, we do not have the resources to resist these well documented abuses perpetrated by AFM. Many of our members came to our Union from the ranks of AFM, after suffering great dissatisfaction with the dictatorial and arbitrary discipline bestowed by AFM. Many others have joined us to avoid being associated with AFM.

At this time, most of our members exist as independent contractors. However, if this legislation is passed, our members will be considered "employees". This will allow AFM to use the secondary boycott to picket our "employee" members, to disrupt deliveries, call out waiters, bell hops, cooks, etc., from establishments at which our members perform. IT WILL LITERALLY PUT OUR UNION OUT OF BUSINESS, after we have faithfully served our members and have promoted opportunities for them to develop their careers OVER THE PAST FIFTY YEARS! Therefore, this legislation, if passed, will deprive our members of the ability to work as AMU musicians.

The effect of this legislation would be to increase the power of AFM to control the music business, allow the abuse our members as well as theirs. It will also cause the disruption of private and public affairs to the great detriment of the general public.

On behalf of the thousand or so members of AMU, enrolled in a half dozen AMU locals, we ask you not to support this terrible legislation which will destroy our Union, and IS NOT in the interest of the general public.

Ben Intorre

Ben Intorre,
President and Treasurer, AMU.

December 22, 1987

IMMIGRANT'S RIGHTS/LABOR RELATIONS
Mr. Steve Hideg
4851 Beverly Boulevard
Los Angeles, California 90004

UNITED STATES SENATE
LABOR SUBCOMMITTEE
428 Dirksen Senate Office Building
Washington D.C. 20510

Attention: Senator Howard M. Metzenbaum,
Chairman, Subcommittee on Labor

Dear Senator,

I am in receipt of your letter and am deeply honored that I have been invited to testify before the Senate Subcommittee on Labor, S-1346, The Performing Arts Labor Relations Amendments of 1987.

Government Officials, like yourself, are compensation for the struggle that immigrants have went through and continue to face in order to make a living as Professional Musicians.

I am enclosing my Testimony and hope that it will be of help to The Committee and The Congress in making the proper decision for everyone who is involved.

Sincerely,

Steve Hideg

Steve Hideg
Member
Union Local 47
AF OF M

Enclosures

SH/bim

TESTIMONY OF STEVE HIDEG

Subject: PERFORMING ARTS LABOR RELATIONS AMENDMENT S-1346, HR-1638

I am an immigrant performing artist and like thousands of other political refugee performers, escaped from the effect of The International Labor Movement in which artists are classified as workers/employees. My political views are well known and publicized (See Exhibit "A"). I have been selected by The American Federation of Musicians for persecution.

Regardless of ethnic background and performance level, we all came here to enjoy freedom and the inalienable right to contract and we oppose the development of employer/employee relationships between purchasors and performing artists.

Due to the Union Managers setting an example and carrying out their threats in the most vicious and discriminatory matter (See Exhibits "B", "C", "D") these cases should be thoroughly analyzed due to such anti-union action by booking agents, orchestra leaders, contractors who are also working as union officers, as well as their employees (Spouses, relatives, etc.) The members are openly threatened and terrorized by the managers and are therefore reluctant to speak out on issues, even those which could seriously effect their lives.

The entire membership is oppressed and they oppose this legislation. We never proposed this legislation and we were never asked to verify it. This is a case when Union Managers with strong international ties and those who are promoting the international labor movement (See Exhibit "E") are going around the membership and the democratic process and asking the Congress to legislate Union interference between the artists and the purchasors.

This amendment is an extremely significant political move and its passing would have serious consequences. To give such a power to an organization functioning under a system of favortism and discriminatory policies would be a great mistake. My whole purpose for being here is their reason for anti-immigrant sentiments and policies (See Exhibit "F"). Therefore, I am asking The Committee, before making their recommendation, to please truly investigate the operations, by-laws and policies of this labor organization called The American Federation of Musicians.

Signed By: Steve Hideg Date: 12/22/87
Steve Hideg

(Note: Due to printing limitations, and in the interest of economy, the exhibits accompanying this statement were retained in the files of the committee.)

LEROY VAN DYKE

P. O. Box 685 • Franklin, Tennessee 37065-0685 • 615-790-2202

December 23, 1987

Senator Howard M. Metzenbaum
United States Senate
Subcommittee on Labor
Committee on Labor and Human Resources
Washington, D.C. 20510

Dear Senator Metzenbaum:

First, my thanks for your prompt attention to my December 7, 1987, letter to you (copy enclosed for your reference), voicing my opposition to Senate Bill 1346. I appreciate your early reply.

Enclosed herewith is a copy of my formal prepared opinion in opposition to the above, and, while some of the ideas embodied there will also be found in this letter, I felt compelled to direct them to you personally.

I respect your position--I know you are an expert in your field--that of distinguished lawmaker. However, I would further say that from your position you could not possibly know the issues as they are and in their entirety. I have been on ground level, eyeball to eyeball with the American Federation of Musicians as a member for almost a third of a century, and I am an expert in my field. I know the facts in their entirety, not just in theory, but in practice.

Contrary to what you have possibly been led to believe, the A.F. of M. is not a benign union working for the benefit of "poor, downtrodden musicians," but rather, a union in a last-ditch-stand attempt to take the live music business back to the dark days of Petrillo some 30 years ago.

Senator Howard M. Metzenbaum
Page 2
December 23, 1987

My feeling is that the concern of the committee should be directed only to the performing musician and no one else. The opinion of the supporting A.F.L.-C.I.O. should not matter. Actually, the opinion of the A.F. of M. should not matter, since they represent only about ten percent of your musician/constituency. That, coupled with the fact that a significant percentage of union members, such as myself, do not back the union position, means that the union is actually speaking for possibly seven percent or less of your musician/constituency.

To force upon such a large majority of working musician/entertainers this ill-advised legislation, which they do not need nor desire, is illogical, to say the least. There is no reason to destroy their democratic rights as independent contractors. Unfortunately, most musicians are not even aware of S. 1346, and so will not be heard.

I think it is obvious that S. 1346 has become a partisan issue, and there is no logic in that.

As for those in the union camp who insist that changes suggested by S. 1346 would be for "labor law purposes only," my reply is this: The Internal Revenue Service has for years looked longingly at the independent/contractor status of most working musicians. If, by law, they were to be designated as "employees" of every buyer who contracted them, we would all be inundated with paperwork and bureaucratic red tape. Any school child could make a correct prediction of disastrous results.

Finally, let me, respectfully, ask you to do the responsible action on S. 1346: let it die a natural death in committee.

Respectfully yours,

Leroy Van Dyke

Leroy Van Dyke

STATEMENT
OF
LEROY VAN DYKE
(MUSICIAN/ENTERTAINER/A.F. OF M. MEMBER)
TO THE
SUBCOMMITTEE ON LABOR
OF THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
REGARDING AND IN OPPOSITION
TO
S. 1346 AND H.R. 1638

DECEMBER 23, 1987

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P. O. Box 685 • Franklin, Tennessee 37065-0685 • 615-790-2202

Wednesday, December 23, 1987

Subject: Senate Bill 1346
House of Representatives Bill 1638

TO WHOM IT MAY CONCERN:

INTRODUCTION

I am Leroy Van Dyke, entertainer/musician; former member of the Board of Directors, Country Music Association; and a member of the American Federation of Musicians, Local #257. I have been an A.F. of M. member for 31 years, have been a musician/entertainer for that same time period.

Note again, please, that while I am an A.F. of M. member, I vehemently oppose Senate Bill 1346 and its companion House of Representatives Bill 1638, the former sponsored by Senator Spark M. Matsunaga, the latter by Representative William Clay.

While I would like to keep this article to a few short paragraphs, that is impossible in view of the complexity of issues, potential for adverse effects, and likely disaster for hundreds of thousands of musicians and citizens making their livelihood from related live music businesses. This is by no means a superficial, shallow issue.

I exercise my right as an American citizen to oppose the position of a union to which I belong.

The issues and ramifications addressed by S. 1346 and H.R. 1638 are so complicated that many local union officials do not understand them, few union members understand them, and most non-union musicians (who make up approximately ninety percent of our musician/performers) are not even aware of the pending legislation.

I will explain in these pages the folly of seriously considering passage of either S. 1346 or H.R. 1638. I will show how this bill would be much more serious and far reaching in its effects than in simple "sit-down" venues.

I am quite aware of A.F. of M. activities relative to this bill and have read prepared statements of J. Martin Emerson, President, A.F. of M.; Jay Collins, President A.F. of M. Local #257 (of which I am a member); lobbyist Ned H. Guthrie and others. Some of my comments will, of necessity, be of a rebuttal nature.

Proposed Changes

This proposal addresses Section 8(e), Taft-Hartley Act. For our purposes here, when I refer to "musicians" or "musician/entertainers," I refer to full-time professionals, not those working day jobs and moonlighting with an instrument, and not A.F. of M. local officials who run the union office in daylight and play part-time after dark.

In its simplest explanation the issue is to change the status of independent contractor/musicians to that of "employees" of any purchasing entity, whether individual, corporate or other.

Likewise, any purchasing entity would be designated as "employer" of musician/entertainers for which they have contracted.

Effects

S. 1346 and H.R. 1638, if enacted, would validate agreements entered into by A.F. of M. locals and purchasers of live music, requiring that all live music be furnished by A.F. of M. members. If any band or individual were not an A.F. of M. member, all union employees of the purchasing entity (bartenders, waiters, delivery personnel, custodial workers, food handlers, etc.) could strike, picket, walk out or slow down, thus legalizing the now illegal and prohibited secondary boycott.

S. 1346 and H.R. 1638, if enacted, would classify any purchaser of live music as the "employer" of the musicians supplying it. As such, musicians would no longer be considered independent contractors. Purchasers of live music would be "employers," and, as such, would be liable for musicians hired in terms of Workmen's Compensation, Unemployment Insurance, Social Security, Local, State and Federal Withholdings and Union Pension and Health Payments.

Background Information and Explanation

Please keep in mind that I am currently a member of A.F. of M., a working musician/entertainer. I submit these objections to the above-mentioned proposals, lest you should read and believe the posture of the A.F. of M. management on these bills. The effects of S. 1346 (and H.R. 1638) would be immediate and disastrous.

For almost a third of a century I have been on ground level, eyeball to eyeball with the A.F. of M. No one who has not been in this position could possibly understand the issues as they are in their entirety.

Contrary to what some of our legislators have been led to believe, the A.F. of M. is not a benign union working for the benefit of "poor, downtrodden" musicians, but rather, as I see it, a union in a last-ditch-stand attempt to take the live music business back to the dark days of Petrillo some thirty years ago.

My feeling is that the concern of the Congress and Senate Subcommittee on Labor should be directed only to the performing musician and no one else. The opinion of the supporting A.F.L.-C.I.O. should not matter. Actually, the opinion of the A.F. of M. should not matter, since they represent only about ten percent of the musician constituency. That, coupled with the fact that a significant percentage of union members, such as myself, do not back the union position, means that the A.F. of M. is actually speaking for possibly seven percent or less of working musicians.

To force upon such a large majority of working musician/entertainers this ill-advised legislation, which the performer neither needs nor desires, is illogical, to say the least. There is no reason to destroy their democratic rights as independent contractors. Unfortunately, most musicians are not even aware of S. 1346 (and H.R. 1638) and will not be heard.

Upon passage of such legislation, tens of thousands, including leader/musicians, partnerships, single performers, independent contractors, cooperatives and supervisors would be stripped of their present status as independent contractors, and forced, against their will, to join the A.F. of M. Pre-hire agreements could require that purchasers be forced to hire only union members. The measure would allow union-purchaser agreements prohibiting negotiations with non-union agents. S. 1346 (and H.R. 1638) would make it a fair labor practice to force self-employed musician/entertainers to join the A.F. of M.

Keep in mind that the A.F. of M. is not a "closed society; they actively solicit members, even to the point of coercion. Ninety percent of today's performing musicians do not belong to the A.F. of M. and do not wish to belong. That freedom of choice should be perpetuated.

I take exception to many statements of Mr. J. Martin Emerson. Contrary to his statements, the formulators of the National Labor

Relations Act were wise in excluding musician/entertainers from some of its provisions.

Mr. Emerson has stated that the A.F. of M. is not asking for "major revisions" of existing labor law. I submit that in practice and in effect, passage of S. 1346 (and H.R. 1638) would be major and of devastating proportions.

Mr. Emerson asks, "Who will represent a musician if a hotel reneges on a contract?" My reply is that in my nearly a third of a century career the A.F. of M. not only has never procured a booking for me, but has never collected for me when I have received "hot" checks or encountered refusals to pay, whether or not the engagements were entered into via union contracts.

Mr. Emerson has stated that these proposed changes would correct an "accident of history," in the fact that musicians were excluded from certain provisions of the Taft-Hartley Law. It was no "accident" by any stretch of the imagination. The live music business is unique and bears no resemblance to any other trade or occupation in the United States of America. Each musician/performer has his own style and delivery and can in no way be placed in the labor mold of someone who fits pipes together, sews a stitch or puts a nut on a bolt. Each musician should be free to do his own bargaining based on his own abilities and his own unique talents.

To pass the proposal in question would, with one stroke of the pen, destroy some 200 well-deliberated court and National Labor Relations Board rulings and throw us a giant step backward.

S. 1346 (and H.R. 1638) would tend to force union membership on working musicians who do not wish to become members, and would increase control and coercion over those who are already A.F. of M. members. In my experience, most A.F. of M. members maintain their status for three main reasons: 1. to reduce the amount of coercion and harassment to which they are subjected by the union; 2. to stay abreast of new directions the A.F. of M. is taking to control them; and, 3. to maintain the meager insurance plans or burial benefits connected with union membership. Passage of S. 1346 or H.R. 1638 would compound the harassment felony.

It is more than obvious from reading articles and comments of A.F. of M. officials that the union position on the issues at hand is dictated by a last-ditch-stand effort to gain monopolistic power and to add to union treasury stores. Please note a clue to reasons for the A.F. of M. position: J. Martin Emerson in the "International Musician" (December '87) said the union needs to "create energy which can lift us out of the abyss of despair" and to "save our federation from total disaster."

I submit that the A.F. of M. stance on S. 1346 (and H.R. 1638) is not in the best interests of the rank and file working musician, but in the self-serving and job and/or salary perpetuation interests of union officials.

Note that no A.F. of M. musician member at the peak of a successful musical career has given it up to take a paid executive position with the union. Many national and local officers are made up of people who cannot compete artistically in the musical marketplace, starved out for other reasons or who desire to gain monopolistic control for their own best interests.

On Page 5, International Musician (December '87) I note that the A.F. of M., far from approaching this suggested legislation on a logical, merit basis, have made a political issue of it. In the above publication are listed 26 Senators "for." Twenty-three of those are Democrats, Fifty-eight out of 59 listed "pro" House members are Democrats. It is abominable and irresponsible on the part of union management or our Congress to make this a partisan issue.

On a local level, Jay Collins, President, A.F. of M. Local #257, here in Nashville, Tennessee, does not necessarily speak for all, or even a majority, of his members. To my knowledge our Local #257 membership has not been polled to ascertain individual opinions. It is typical of A.F. of M. leaders' procedures, and one reason more and more members have been driven away.

Mr. Collins has stated that it is "out of character" for our proud Democracy to "permit such an inequity." I counter that it is "out of character" in a country where freedom is our underlying theme and hope to vote for a measure which has as its real intent the attempt to force all musicians (leader/musicians, partnerships, single performers, independent contractors, musical cooperatives, supervisors) to embrace union membership. I feel that union membership should be voluntary, not forced. It would be contrary to our democratic commitment to freedom to enact such a restraint-of-trade monopolistic measure.

Contrary to Mr. Collins' opinion, the working musician "enjoys" the present provisions of the National Labor Relations Act, and sees no need to change.

The A.F. of M. has incorrectly dubbed S. 1346 (and H.R. 1638) the "right-to-talk" bill. As a union member, I attest to the fact that we already have that right. We, as musicians, discuss a prospective engagement with our prospective buyer, agree on all terms, then sign a contract. If we can't agree, we don't sign--it's that simple. Almost all bargaining approaches to buyers by union management are instigated by the union, not at the request of the rank and file musician. Our working conditions are determined by the contract we sign, union or non-union.

Adding an A.F. of M. intermediary in the vast majority of cases alienates the two parties concerned, much like a difference of opinion after it goes to lawyers for litigation. Such meddling is just another fly in the ointment. I know of no one in Nashville or any other local who has benefited from union intervention. We do not need the "assistance" or "protection" of the A.F. of M. We need to be left free to follow our own independent practices.

One former union official (Victor W. Fuentealba) stated that this bill would not tend to force union membership upon musicians, then in the next sentence said that musicians would have seven days to join!

Some reference has been made by union official J. Martin Emerson relative to the travel aspects of our live music business. He missed the point completely when he stated in his prepared text to the Senate Subcommittee that "the musician, in order to support his family must travel far and near and work for many successive employers in any given time period." I testify to the fact that we do travel extensively, some of us in Nashville having done up to 300 one-nighters per year. I further affirm that we do this voluntarily, because that is where the money is, and we like this way of life. There are tremendous employment opportunities for musicians in all types of traveling musical productions (country, rock, pop, etc.) and most of these jobs pay much more than local scales. Incidentally, the A.F. of M. requires us to pay "travel dues" on all engagements outside our local jurisdiction. "Travel dues" is a sugar-coated term for what is actually an illegal income tax collected by the union.

Regarding travel, the late big band great Woody Hermanin the International Musician (December '87) was quoted thusly: "If you're an independent kind of person who values freedom in music, the best existence is to be on the road." He found, and tens of thousands of others still find, the road "deeply satisfying." Many of our local and national officials have never worked outside a local situation, and have never toured nationally and internationally, so do not understand this concept.

Ned H. Guthrie, A.F. of M. lobbyist, has, in a letter to Don Russell, The Don Russell Orchestras, Boston, Massachusetts, repeatedly emphasized that the proposed changes of S. 1346 (and H.R. 1638) were for "Labor Law purposes only."

Mr. Guthrie, I believe, knows better. For years the Internal Revenue Service has looked longingly at the status of independent contractor/musicians, and have in the past attempted to categorize them as "employees" for payroll deduction purposes. Any school child could make a correct prediction of disastrous effects to our business. The I.R.S. would step in immediately with mountains of paperwork.

Our booking procedures in the outdoor live-music business (rodeos, fairs, expositions, festivals, amusement parks, etc.) are extremely complicated and fragile. Typically, the chain is this: from musician to employer/leader, to manager, to booking agent, to packaging agent, to committee, to manager. Add to this the water-muddying influence of I.R.S. paperwork and bureaucratic red tape, and intervention by A.F. of M. representatives, and you have decimated the employment opportunities of tens of thousands of musicians. The above-mentioned venues would immediately switch to alternate forms of entertainment, i.e., demolition derbies, mud wrestling, races, talent contests, aerial and circus acts, miscellaneous variety acts, tractor pulls, disco dances, and yes, even pig races. We already have heavy competition from these sources.

S. 1346 (and H.R. 1638) would sound the death knell to our business as we know it today.

Hotels and other such venues would switch to disco or other such "canned" entertainment, and have so stated.

Contrary to the union management claim of more benefits, the end result would be fewer jobs for working musicians, with a higher rate of unemployment, and more destitute musicians walking the streets in search of jobs. "Union shop security" is a misnomer. Chaos would prevail.

Buyers would absolutely refuse to saddle themselves with the liabilities and mountains of paperwork involved. The already ailing night club, concert, fair, and exposition business would find S. 1346 (and H.R. 1638) a further economic setback. Keep in mind that those hurt the most would be those least able to survive it: the working musician. Individuals hurt the least would be those in a "superstar" category, who are already making several times union scale for their efforts. Contrary to popular belief, even among most union officials, most groups and even well-known stars who do not have hit records or television exposure cannot afford a significant loss of income. They would either have to get out of the live entertainment business or dismiss the band and work as a single, putting more unemployed musicians out on the street.

There are hundreds of reputable persons and firms who market live music talent internationally to the benefit of all musicians. Two leaders are Harry "Hap" Peebles, The Harry Peebles Agency, Kansas City, Kansas; and George Moffett, Variety Attractions, Zanesville, Ohio, The agencies of these two gentlemen alone are responsible for booking some 1500 live shows per year. They, and everyone else in their category with whom I have talked, are opposed to S. 1346 (and H.R. 1638). Mr. Peebles, a veteran of over fifty years of marketing live music, flatly stated that these bills would "put us out of the live music business." Mr. Moffett concurs in that opinion.

There would also be a corresponding loss of employment in related supportive businesses: lighting, staging and sound contracting.

For those who play one-nighters, this bill would mean that the individual musician/entertainers could have 300 (more or less) employers, with the corresponding avalanche of paperwork it would entail.

No one should be so naive as to believe that the measure will not change our status with the Internal Revenue Service.

Summary and Conclusion

In summary, it is quite obvious that the sponsors of S. 1346 (and H.R. 1638), respectively, Senator Matsunaga and Congressman Clay, are sponsors in name only. The true behind-the-scenes sponsor is the A.F. of M., backed by the A.F.L.-C.I.O. These bills do not serve the working musician, only union management.

I submit that passage of S. 1346 (and H.R. 1638) would stifle private enterprise and freedom to choose, would set our business back thirty years to the overbearing, dictatorial days of the Petrillo era. It would, in effect, set up a monopoly for the A.F. of M., and would unquestionably result in restraint-of-trade and price-fixing practices.

If S. 1346 (and H.R. 1638) becomes law, the evils will remain long after the deed is done, and we as musicians will have to live with the yoke of an unwise and ill-advised change in the law.

It might be of some significance to note that Sponsoring Senator Matsunaga (S. 1346) has, in the past, been a recipient of campaign funds directly from the A.F. of M.

I as working musician/entertainer have no interest in changing our present status as independent contractors. I see no logic in legislation which would benefit only about seven percent of our number.

I am opposed to any changes which would enable "pre-hire" agreements to cripple my own bargaining procedures.

It is unwise to require our buyers to function as "employers," with all resultant withholding, liability, pension fund and other such liabilities.

I know from experience that we as musician/entertainers need to be able to negotiate freely on our own terms with either high or low budget venues without harassment from the A.F. of M.

I know from experience that few buyers will sign contracts designating them as legal "employers." In fact, many of our major fairs, expositions and rodeos already state in their contracts that they are not employers, and we are not their employees.

I see no need to change our designation by law. Our live-music industry labor relations have for years been extremely stable. "If it ain't broke, don't fix it."

This legislation would be a disaster for all leader/musicians, partnerships, single performers, independent contractors, cooperatives and supervisors.

In this issue one pen stroke could undo 200 well-deliberated decisions by the courts and the National Labor Relations Board. These decisions have served us well, and we have no need to contribute to that furtherance of A.F. of M. monopolies.

I think it would be irresponsible to make secondary boycotts legal by passage of this bill.

I would point the finger of shame to all who would stoop to make a partisan issue of this serious question.

If these changes, backed by the union, are for "labor law only" and not in "practice," then there is no need for change.

I and thousands like me support in its entirety the positions of Charles Peterson, National Association of Orchestra Leaders; Thomas E. Sweet, Minnesota Association of Theatrical Agencies; Godfrey P. Schmidt, Attorney, National Association of Orchestra Leaders; C. W. Kendall, International Theatrical Agencies Association; Jerry Davis, National Association of Orchestra Leaders; John P. Berglund, Minnesota Licensed Beverage Association; Kenn Rockler, Minnesota Licensed Beverage Association; Darrel Hein, National Ballroom and Entertainment Association; John Carleton, John Carleton Orchestra, Reno, Nevada; Steve Slagle, National Association of Campus Activities; Arthur K. Blackburn, Minnesota Bluegraff Old-Time Association; William A. Heaberlin, International Theatrical Agencies Association; and all others who would oppose S. 1346 (and H.R. 1638).

My opinions as noted in this article are based on my 31 years as a musician/entertainer/union member and my belief in free enterprise, free trade and hope for a minimum of restraint, coercion and harassment in our professional marketplace.

I respectfully urge you to protect the freedom and rights of my fellow musician/entertainers, and to refrain from any action which would be injurious to the already fragile process by which hundreds of thousands of musicians gain their engagements and therefore their livelihood.

I further ask that you ignore the backing of the A.F.L.-C.I.O. and the A.F. of M. in the issue of S. 1346 (and H.R. 1638). Please, only consider the welfare of the majority of your musician-constituency, 93 percent of which would be harmed by the measure. Recognize this bill and any similar future legislation as a wolf in sheep's clothing, a Pandora's box, a can full of worms, and let it die a natural death.

I and tens of thousands of other working musician/entertainers thank you!

Respectfully submitted,

Leroy Van Dyke

Leroy Van Dyke

WRITTEN TESTIMONY IN OPPOSITION TO S. 1346, THE PERFORMING ARTS LABOR RELATIONS AMENDMENTS OF 1987

SUBMITTED BY

NATIONAL BALLROOM & ENTERTAINMENT ASSOCIATION (N.B.E.A.)
BY THEIR LEGAL COUNSEL
STEPHEN W. ROBERTS
DAVIS, HOCKENBERG, WINE, BROWN, KOEHN & SHORS
2300 FINANCIAL CENTER
DES MOINES, IOWA 50309

While the National Ballroom and Entertainment Association (NBEA) regrets that it was not given the opportunity to testify in person in opposition to S. 1346, the NBEA nevertheless gratefully accepts the invitation of the Chairman, the Honorable Howard M. Metzenbaum, to submit written testimony opposing this legislation which would be disastrous for the industry.

The NBEA is a national association of ballrooms, a number of which would be considered small business. The typical ballroom charges an admission at the door to patrons who attend the establishment for the principal purpose of dancing. Usually, liquid refreshments and sometimes light food is available as incidentals to the main attraction which is dancing to a live band.

Normally ballrooms operate only in the evenings and only a few nights a week (from one to four) although a very few operate more often. Ballroom operators normally contract with bandleaders who are in the single engagement field, to perform on a specific night. The band arrives at the ballroom shortly before the dance is to begin, leaves when the dance is finished, and ordinarily does not appear again at that ballroom for at least another month, several months or a year, or more.

The case of *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed 1947 (1947) financed by the then NBOA predecessor to the NBEA, established legally what in fact was and is true-- *that the bandleader is the employer of the musicians in his band*. Specifically the *Bartels* case, *supra* held that ballroom operators were not responsible to withhold FICA and Social Security taxes from each individual band member who played in their establishment because the ballroom operators were not the employers of the individual band members. Rather the bandleader is the one who has the power to hire and fire individual musicians, negotiates what he will pay them, directs them in their activities as far as to how they play, when they play, where they play and what they play as well as their general conduct while a member of the band.

In contrast to the clear recognition in the *Bartels* case of the lack of an employer-employee relationship, Senate 1346 would create a complete fiction as far as the employer-employee relationship is concerned, by attempting to make the ballroom operator the employer of every musician appearing with each individual band simply because the operator has contracted with an independent contractor (the bandleader) to provide the bandleader's band and music for its establishment. Besides creating an absolutely false and unrealistic relationship, the result of this law could well be that every ballroom operator as well as every other independent purchaser of live music such as nightclubs, theatres, auditoriums, college groups, etc. would have to make out individual withholding forms for each and every musician who plays in their establishment during the entire year and withhold the appropriate amount from his or her wages. For example, a typical band that plays in one of the NBEA establishments would include anywhere from four to twelve musicians and an active ballroom with private parties might have twelve different bands in a given month. Assuming for purposes of discussion that half these bands had four members and the other half had twelve, withholding slips would have to be made out for nearly 100 people for a particular month. While some bands might reappear in subsequent months necessitating additional withholding records to be kept on each of these band members, there would also be the problem of different bands appearing in different months resulting in still more withholding forms, paperwork and accounting. If a ballroom or other entertainment facility had several bands or acts on a particular evening the withholding requirement would be even worse.

In addition many ballrooms rent their facilities for private parties with live music and this fact would present a further complication. Often the private host of such a party hires and pays the band. Would the private host thus be required for this one individual engagement to withhold from the band or would somehow the ballroom operator be given this burden?

Governmental officials and particularly elected officials frequently decry the "paper burden" on all businesses but specifically small businesses. Many of the ballrooms and for that matter many of the other providers of live music are small businesses without the large sophisticated staffs and/or equipment necessary to handle all the increased paperwork that would be generated by this bill. The costs of the paperwork itself would be incalculable on these establishments and could well have the negative effect of lessening employment opportunities for musicians as purchasers of music choose to convert to recorded music or close up their businesses entirely.

It should further be noted that rising costs generally, travelling bands' escalating costs in particular, TV and changes in musical tastes have all combined to greatly reduce the overall number of purchasers of live music particularly in the ballroom industry which is not a lucrative industry and where expenses have to be kept to a minimum in order to survive. For example, just in the NBEA, twenty years ago the Association had approximately 200 members (which in turn was drastically reduced from the pre World Ward II numbers) whereas today the Association membership is around 50 establishments. This bill would only accelerate the trend toward less live music and consequent loss of employment for individual musicians.

With all the negatives associated with Senate 1346, it is difficult to understand why proponents have been attempting to get this legislation passed for years. Some indicate that somehow this bill would help union musicians but in fact many purchasers of live music already contract only with union bands. Others seek to compare the construction business to the live music business in an effort to say that the music business should be treated the same as the construction business. In fact the two businesses are vastly different. To note just one major difference, construction jobs tend to last for a considerable length time whereas nearly all musical engagements of ballrooms are of very short duration, usually one night and for about four actual hours of the performance.

In summary, S. 1346 should not be passed because it seeks to impose a complete and unworkable fiction upon the live music industry, that is, that the establishment purchasing the live music from the independent bandleader contractor is the "employer" of the musicians in the bandleader's band. Such fiction would create havoc in the industry; put incredible paperwork burdens on already struggling businesses and in the end serve no useful or discernible purpose. The case of Bartels v. Birmingham, supra was correct when it was decided and has stood the test of time well. The bill in question would strongly damage the industry, including hurting the most the persons this bill ostensibly seeks to help--the individual musician. For all these reasons, we hope that members of the United States Senate and House of Representatives will join forces to defeat this attempt to create a legal anomaly that would be a practical disaster.

Respectfully submitted,

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Legal Counsel
National Ballroom and
Entertainment Association

N.40/93-97

Senator MATSUNAGA. Unfortunately, I am already late for my next appointment, so if we have any questions, we will submit them to you in writing for your response in writing for the record.

Thank you again, all of you, for appearing before this Subcommittee.

The subcommittee stands in recess subject to the call of the Chair.

[Whereupon, at 3:20 p.m., the subcommittee was adjourned.]

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